REAUTHORIZATION OF THE U.S. DEPARTMENT OF JUSTICE: EXECUTIVE OFFICE FOR U.S. ATTORNEYS, CIVIL DIVISION, ENVIRONMENT AND NATURAL RESOURCES DIVISION, EXECUTIVE OFFICE FOR U.S. TRUSTEES, AND OFFICE OF THE SOLICITOR GENERAL

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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MONDAY, APRIL 8, 2003

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 2:05 p.m., in Room 2141, Rayburn House Office Building, Hon. Chris Cannon [Chairman of the Subcommittee] presiding.

Mr. CANNON. The Subcommittee will come to order.

I would like to welcome the panel today.

I would also point out that we have a friend of mine, Eddie Radon Levy, who is a Congressman, I keep trying to say "dipotado," in the Mexican House of Representatives today. Mr. Radon Levy is the Chairman of the Subcommittee of the Mexican House on Mexican Affairs Abroad. So we welcome Eddie with us today. He will be leaving I think at some point because he has got other meetings, but we encouraged him to come and enjoy at least part of this hearing.

I hope the hearing by the way will be enjoyable for everyone concerned.

This afternoon we will hear testimony from four distinguished representatives of the Department of Justice who will report on activities of their respective positions preparatory to consideration by the Committee on the Judiciary of legislation reauthorizing the Department.

Today's hearing will not only enable us to make recommendations to the Committee concerning the activities of these divisions, but it will also provide us with the basis and context for possible subsequent hearings and continuing oversight.

The purpose of a reauthorization hearing is to provide an opportunity to examine the budget requests and policy priorities from the representatives of these components. Appropriate areas of inquiry include, for example, the Department's effectiveness in resource allocation and other budget efficiencies, as well consider-

ation of how well these components have set and achieved their goals.

The Subcommittee's oversight responsibility with respect to the Department include five of the most active and important divisions: The Environmental and Natural Resources Division, the Civil Division, the Executive Office for the United States Attorneys, the Executive Office for the United States Trustees, and the Office of the Solicitor General.

The Environment and Natural Resources Division—I will call that ENRD from now on—first created in 1909 as the Public Lands Division, has seen its areas of responsibility expanded to include litigation concerning the protection, use, and development of the Nation's natural resources and public lands, wildlife protection, Indian rights and claims, cleanup of the Nation's hazardous waste sites, the acquisition of prior property for Federal use, and the defense of environmental challenges to Government programs and activities. It is in effect the largest environmental law firm in the country.

The Civil Division is one of DOJ's six litigating divisions. It represents the United States, its departments and the agencies, Members of Congress—so we want to treat you guys well, by the way—cabinet offices and other Federal employees. It brings suit to collect money owed the United States by delinquent debtors and recovers sums lost to the Government through waste, fraud, and corruption. Finally, it enforces Federal consumer protection laws, immigration laws and policies, and the regulatory integrity of Federal programs.

The Executive Office for the United States Attorneys provides support and coordination to the 94 United States Attorneys throughout the country in the following areas: General executive assistance and direction, policy development, and administrative management direction and oversight. It supervises the legal education of DOJ personnel through such units as the Attorney General's Advocacy Institute and is entrusted with the evaluation and improvement of U.S. Attorney's performance.

The Executive Office for the United States Trustees is responsible for overseeing the administration of bankruptcy cases and the integrity of the bankruptcy system. It appoints and supervises private trustees who administer chapter 7, 12, and 13 bankruptcy estates, and it enforces the requirements of the bankruptcy code to prevent fraud and abuse.

The Office of Solicitor General supervises and conducts Government litigation in the United States Supreme Court. It is involved in about two-thirds of all the cases that the Supreme Court decides on the merits each year. The Solicitor General reviews all cases decided adversely to the Government in the lower courts to determine whether they should be appealed and, if so, which position should be taken.

The Subcommittee has chosen to accept written testimony from the Office of Solicitor General as its budget request is the smallest and does not represent a significant increase. So we may look at or hold a hearing in the future on the Office of Solicitor General.

I might note that we were just handed a report which we have not had a chance to evaluate much, but the conclusions appear to

be a little bit critical of the program and its effort to detect fraud and abuse. And let me just give you a quote from that:

The UST Program does not have an ongoing systematic process to identify vulnerabilities in the bankruptcy system, and it has not established uniform internal controls to detect common high-risk frauds such as a debtor's failure to disclose all assets. In fact, the management controls in place did not address most of the fraud indicators identified by the UST Manual, and instead focuses primarily on fraud that might be committed by trustees and their employees rather than by debtors.

In addition, the report concludes that, as a result, the FBI's estimated 10 percent of bankruptcy cases that involve fraud may not be discovered, and the UST Program's mission to preserve the integrity of the bankruptcy system may not be accomplished as effectively as it should.

I also note that the report contains a fairly extensive response from Mr. Friedman on behalf of the program.

Given the fact that we have not had sufficient time to study the report, its conclusions, and the program's response, I would suggest that we follow up either in the form of written questions or further hearing if appropriate under the circumstances.

Just a couple of points here on how we will proceed in the hearing. We will take testimony from our four representatives from the Justice Department today.

You will note that we have a lighting system, which I think works now. It looks like we have got this thing working. A little problem there. You will note that it starts with a green light. After 4 minutes it turns to a yellow, and then it turns to a red light. It is my habit to tap the gavel at 5 minutes. We would appreciate it if you would finish up your thought. We don't want to cut people off in their thinking, but I find that it works much better if everybody knows that—members of this panel included on this side of the dais—that 5 minutes is 5 minutes. So if you could wrap it by the time we get there, I will appreciate that, and I will try to be consistent in my tapping. If you are really boring and I lose track, I will get nudged or something.

We look forward to hearing from representatives of these divisions today. Mr. Watt was going to join us. We may allow him to make an opening statement when he comes in or after the panel.

Does anyone on the panel wish to submit an opening statement for the record? Or, worse yet, take 5 minutes? Thank you. Good guys on this side of the Committee. We appreciate that.

It is my pleasure to welcome representatives from the Department of Justice who are with us today to testify regarding the subject matter of today's hearing.

I will hear first from Thomas Sansonetti, who is the Assistant Attorney General in charge of the Environment and Natural Resources Division at the Department of Justice. Mr. Sansonetti served as the Solicitor for the Department of Interior from 1990 to 1993, where he was the primary legal advisor to Secretary Manuel Lujan, Jr., and the six Assistant Secretaries on all legal matters confronting the Department.

During his tenure, Mr. Sansonetti signed the $1.1 billion Exxon Valdez oil spill settlement after serving as one of the six Federal

negotiators, and was appointed counsel to the Endangered Species Committee for the Spotted Owl hearings in Oregon.

He also served at the Interior Department as Associate Solicitor on Energy and Natural Resource from 1987 to 1989, and we just barely missed each other. I left the Department as an Associate Solicitor in 1987, but I followed your career, Mr. Sansonetti, and appreciate it.

By the way, he was the Administrative Assistant and Legislative Director for then Congressman Craig Thomas during the 101st Congress. President George W. Bush also appointed him to chair the Presidential Advisory Commission on Western Water Resources.

Mr. Sansonetti received both a BA and an MBA from the University of Virginia and received a law degree from Washington Lee University.

I welcome Mr. Sansonetti.

And I will go ahead and introduce the other panelists, and then we will just go through the panel, if you don't mind.

Next we have Mr. Stuart Schiffer in the Department or who is the Deputy Assistant Attorney General in the Civil Division of the State—or the Department of Justice.

Since 1978, Mr. Schiffer has served as the Senior Career Official in the Civil Division, Justice's largest litigating division. He is responsible for management of the Division's 280 attorneys in the Commercial Litigation Branch.

On numerous cases he has served as the Division's Acting Assistant Attorney General, most recently in the first 8 months of the current Administration.

He is a charter member of the Senior Executive Service, which is I think is an enormous honor, and has four times received Presidential Rank Awards, the highest awards given to the members of the Senior Executive Service. Mr. Schiffer received both his undergraduate and law degrees from the University of Illinois.

Mr. Guy Lewis is Director of the Executive Committee or the Executive Office for United States Attorneys in the Department of Justice.

Mr. Lewis is the former United States Attorney for the Southern District of Florida, where he has been an Assistant since 1988, prior to being appointed as the United States Attorney in 2000.

Mr. Lewis received his undergraduate degree from the University of Tennessee and his law degree from the University of Memphis.

And Mr. Lawrence Friedman is Director of the Executive Office of the United States Trustees at the Department of Justice.

Prior to joining the Department of Justice, Mr. Friedman was a partner in the Southfield law firm of Friedman & Kohut. He was appointed to the panel of Chapter 7 Trustees for the Eastern District of Michigan in 1990, and also served as a Chapter 11 Trustee when so appointed and managed to administer more than 10,000 bankruptcy cases as a trustee.

Mr. Friedman received his undergraduate degree from Hillsdale College and his law degree from Thomas M. Cooley Law School.

We thank you for coming back to join us, Mr. Friedman, and we thank you all for coming to today's hearing.

And we will now turn the time over to Mr. Sansonetti for 5 minutes, please.

Thank you.

STATEMENT OF HONORABLE THOMAS SANSONETTI, ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION

Mr. SANSONETTI. Thank you, Chairman Cannon, and Members of the Subcommittee.

I am pleased to be here today, and welcome this opportunity to tell you about the Environment and Natural Resources Division. I will summarize the Division's work which is essential to the environmental and natural resource protection in this country, and then discuss the resources that the Administration is requesting for the Division for the fiscal year 2004.

If Congress approves funding for our proposed Hazardous Materials Transportation Initiative, which promotes Homeland Security, and our Tribal Trust Fund Litigation Initiative, which provides necessary resources to defend multi-billion-dollar claims against the public fisc, then the Division will receive the first real increase in its budget in 10 years.

The Division's mission is to enforce civil and criminal environmental laws that protect the health and environment of our citizens, and it defends suits challenging environmental and conservation laws, programs, and activities.

We also represent the United States in matters concerning Indian rights and claims in the acquisition of Federal property. We have approximately 400 lawyers handling over 10,000 active cases, and we represent virtually every Federal agency with cases in every judicial district in the United States.

Our principle clients include the EPA and the Departments of Interior, Defense, and Agriculture and will soon include the Department of Homeland Security.

Many of our cases involve defensive litigation regarding alleged violations by the United States of the environmental laws, for example, in connection with the Federal highway construction or airport expansion.

Another significant portion of our docket consists of nondiscretionary imminent-domain litigation involving the acquisition of land for important national projects when our defensive and imminent domain litigation is considered together.

In cases funded from the General Legal Activities Appropriation, over 60 percent of our attorneys' time is spent on nondiscretionary cases. This fact has important resource implications, as we cannot always anticipate our future workload.

Nevertheless, we are committed to ensuring that American taxpayers are getting their monies' worth. And despite budget constraints and declining resources beginning in the 1990's, we have achieved significant cost-effective results.

We have obtained more than $7.9 billion dollars in fiscal years 2001 and 2002 in environmental cleanup and compliance commitments, two of our best years ever.

We have secured civil penalties and criminal fines for the U.S. Treasury that exceed the Division's GLA budget.

We have obtained benefits for human health in the environment that provide an impressive return on the taxpayers' dollar.

We have also protected the taxpayer from invalid or overbroad monetary claims sometimes for hundreds of millions of dollars.

To leverage our resources, we have forged partnerships with the U.S. Attorneys' Offices and State and local officials across the Nation. For example, we recently joined the National Association of Attorneys General in announcing the release of our guidelines for joint State, Federal, civil, environmental enforcement litigation.

We approach our work with the spirit of teamwork, cooperation, and Federalism that is the hallmark of effective environmental protection. And my written testimony provides several examples that illustrate the success of this approach.

Now, for fiscal year 2004, the President has requested $81.25 million to the Division within the Justice Department's GLA appropriation. Most of the increase for the fiscal year 2003 appropriation is for mandatory adjustments and allowances, but we are also requesting $4.188 million for two initiatives: The Hazardous Materials Transportation Initiative, and the Tribal Trust Fund Litigation Initiative.

Funding for both initiatives is critical, and if money is provided, again, this would be the first real increase the Division's budget has seen in over a decade.

The Hazardous Materials Transportation Initiative will help protect America against the threat of terrorism by helping to prevent, disrupt, and defeat terrorist operations before they occur, and by vigorously prosecuting those who have committed or intend to commit terrorist attacks on the United States.

Experts who have considered the possible terrorist targets in the wake of September 11th attacks have identified Nation's Hazardous Material Transportation and Handling System as a vulnerable area.

The Tribal Trust Litigation Initiative is essential for the Government to effectively defend itself in 22 lawsuits brought by various Indian tribes alleging that the United States has mismanaged tribal assets and failed to provide an accounting of the money collected, managed, and disbursed by the United States of the behalf of the tribes.

Some of these cases seek an order requiring the United States perform a multi-million dollar, multi-year accounting and others seek a money judgment for the losses the tribes claim they have suffered.

In these cases filed so far, the tribes are claiming that they are owed more than $3 billion, and 200 to 300 other tribes may be preparing claims for similar amounts.

These Tribal Trust cases are similar to the huge and controversial Cobell versus Norton lawsuit, a class-action on behalf of 300,000 individual Indians. And to avoid another situation similar to Cobell, it is critical the Department of Justice establish a team dedicated to litigating these cases.

I would be happy to answer any questions that the Committee may have regarding the Division and its work.

Mr. CANNON. Thank you, Mr. Sansonetti.

[The prepared statement of Mr. Sansonetti follows:]

PREPARED STATEMENT OF THOMAS L. SANSONETTI

INTRODUCTION

Chairman Cannon, Congressman Watt, and Members of the Subcommittee, I am pleased to be here today, along with my colleagues from the Department of Justice. I welcome this opportunity to discuss the Environment and Natural Resources Division, one of the principal litigating Divisions within the Department of Justice, and to answer any questions that the Subcommittee may have about the Division.

In my testimony today, I will first summarize the Division's work and provide an outline of the scope of our responsibilities. Our work is essential to the implementation of Congressional programs to protect the nation's environment and its natural resources, and to defend federal agencies sued by others. We have a long and distinguished history, and the Division's attorneys have built a record that demonstrates their commitment to legal excellence. In the second part of my testimony, I will discuss the resources that the Administration is requesting for the Division as part of its fiscal year 2004 budget. In particular, I will focus on the monies we are requesting for two ENRD initiatives—the Hazardous Materials Transportation Initiative, which will promote homeland security, and the Tribal Trust Fund Litigation Initiative, which will provide resources to defend multi-billion claims against the public fisc. If Congress decides to approve funding for these two important initiatives, it would constitute the first real increase that the Division's budget has seen in the last decade.

OVERVIEW OF THE ENVIRONMENT AND NATURAL RESOURCES DIVISION

The Environment and Natural Resources Division's mission is to enforce civil and criminal environmental laws and programs to protect the health and environment of United States citizens, and to defend suits challenging environmental and conservation laws, programs and activities. We represent the United States in matters concerning the protection, use and development of the Nation's natural resources and public lands, wildlife protection, Indian rights and claims, and the acquisition of federal property. We represent virtually every federal agency in over 10,000 active cases in every judicial district in the nation utilizing the efforts of approximately 400 lawyers at the present time. Our principal clients include the U.S. Environmental Protection Agency, and the Departments of, Agriculture, Commerce, Defense, Energy, the Interior, and Transportation. We will soon be responsible for a portion of the new Department of Homeland Security cases as well.

Many of our cases involve defensive litigation in which the United States is being sued for alleged violations of the environmental laws, for example in connection with federal highway construction, airport expansion, or military training. These defensive cases are non-discretionary. This large defensive docket has important implications for the Division's resources because we cannot always anticipate our future workload. Effective lawyering in these cases is critical to agency implementation of Congressionally mandated programs and protection of the public fisc.

In addition to our defensive work, another significant portion of our docket consists of non-discretionary eminent domain litigation. This work, undertaken pursuant to Congressional direction or authority, involves the acquisition of land for important national projects such as the construction of federal courthouses and the construction or expansion of border stations for the Immigration and Naturalization Service. When our defensive and eminent domain litigation is considered together, in cases funded from the General Legal Activities (GLA) appropriation over 60 percent of our attorney time is spent on non-discretionary cases.

The Division is committed to ensuring that American taxpayers are getting their money's worth. Despite budget constraints and declining resources beginning in the 1990's, we have achieved significant, cost-effective results for the public. Conserving the Superfund to ensure prompt cleanup of hazardous waste sites is a top priority for the Division, and FY 2001 and 2002 were the two best consecutive years on record for Superfund cost recovery, Superfund injunctive relief, and natural resource damage recovery. In fact, when court-ordered injunctive relief for Superfund, the Clean Air Act, Clean Water Act, and hazardous waste enforcement laws is combined, we have obtained more than $7.9 billion in cleanup and compliance commitments, two of our best years ever. We have secured civil penalties and criminal fines for the U.S. Treasury that exceed the Division's GLA budget, and obtained benefits for human health and the environment that provide an impressive return on the taxpayer's dollar. We also have protected the taxpayer from invalid or overbroad monetary claims against the United States, claims that sometimes involve hundreds of millions of dollars.

To leverage our resources and enhance our effectiveness, we have forged partnerships with U.S. Attorneys' Offices and state Attorneys General and other state and local officials across the nation. Through Law Enforcement Coordinating Committees and other task forces developed in U.S. Attorneys' Offices across the country, we have increased cooperation among local, state, and federal environmental enforcement offices. In addition, just two weeks ago, in cooperation with the National Association of Attorneys General (NAAG) and EPA, we announced the release of our "Guidelines for Joint State/Federal Civil Environmental Enforcement Litigation," which will assist states and the federal government in the conduct of joint civil environment enforcement litigation. In these ways and many others, we approach our work with the spirit of teamwork, cooperation, and federalism that is the hallmark of effective environmental protection. I would like to take a moment to discuss some cases from my tenure as Assistant Attorney General that illustrate the success of this approach.

Fraudulent testing of the integrity of underground storage tanks is a major problem. Tests that indicate that a tank is sound when in fact it is not can result in major environmental harm and property damage, and the Division is committed to rooting out and prosecuting fraud in this area. In *United States* v. *Tanknology*, which involved fraudulent testing of tanks in Arizona, Florida, and Texas, among other states, we worked with the EPA Criminal Investigation Division, FBI, the Postal Service Office of the Inspector General, Defense Criminal Investigative Service, Army Criminal Investigation Division, Air Force Office of Special Investigations, Navy Criminal Investigative Service, NASA, and personnel from the Texas Natural Resources and Conservation Commission and the Pennsylvania Department of Environmental Protection to obtain $1 million in criminal fines and another $1.29 million in restitution from Tanknology-NDE International, the largest UST testing company in the United States. In another such case last year, *United States* v. *Adams*, we worked with the North Carolina State Bureau of Investigation, South Carolina Department of Health and Environmental Control Office of Criminal Investigations, and U.S. EPA, to make sure that the person responsible for testing fraud in the Carolinas, Florida, Georgia, Tennessee, and Virginia, was sentenced to 27 months in prison and three years of supervisory release for conspiracy to commit mail fraud and related crimes. In addition to being a good example of federal-state cooperation, these cases illustrate that we are committed to leveling the playing field in our enforcement work and ensuring that bad actors don't get an unfair competitive advantage over good corporate citizens who invest in compliance and environmental management programs.

Another great example of cooperation came in *United States* v. *Nuyen*, where we successfully concluded the first-ever criminal prosecution under the federal Residential Lead-Based Paint Hazard Reduction Act in conjunction with the U.S. Attorney's Offices here in the District and in Maryland. This Act requires landlords to give tenants warnings about actual and possible lead hazards. Lead poisoning can impair a child's central nervous system, kidneys, and bone marrow and even cause coma, convulsions, and death, and is especially acute among low-income and minority children living in older housing. The defendant, a Maryland landlord, pleaded guilty to obstructing justice and making false statements to federal officials, as well as violating the Lead Hazard Reduction Act. This case is part of a larger initiative to protect our nation's children from the hazards of lead paint and includes civil settlements which will result in the cleanup of such hazards in more than 16,000 apartments in New York, Los Angeles, and Chicago.

Also, earlier this year, we joined EPA and the state of Washington in announcing a civil settlement with Olympic Pipe Line Company and Shell Pipeline Company LP for environmental violations leading to a fatal pipeline rupture in Bellingham, Washington, which caused the deaths of two 10-year-old boys and an 18-year-old man. The companies will pay civil penalties of $15 million total, to be split equally between the federal government and the State, and will spend an estimated $77 million to conduct programs for state-of-the-art spill prevention work on thousands of miles of pipelines in states including Washington, Colorado, Kansas, Illinois, Indiana, Ohio, Oklahoma and Texas. The companies will also pay $21 million total in criminal fines. Promoting and maintaining plant and infrastructure security is of paramount concern, particularly in these uncertain times, and we hope that the measures imposed in this case will help prevent such a tragedy from ever happening again.

These are only a few of the Division's many cases, but they are representative of the high-quality, cost-effective work that the Division's staff performs every day on behalf of the American taxpayer. If you are interested in learning more about the Division's work, please visit our website at http://www.usdoj.gov/enrd/pressroom.html.

ENRD'S BUDGET REQUEST FOR FISCAL YEAR 2004

The Division receives its annual appropriation from the General Legal Activities (GLA) portion of the Justice Department's appropriation. For fiscal year 2004, the President has requested $81,205,000 for the Division within the Justice Department's GLA appropriation. Most of the increase over the FY 2003 appropriation is due to mandatory adjustments and allowances, including pay raises, other salary adjustments, and increases for GSA rent, which will allow the Division to maintain its current level of operations. However, as part of his proposed budget, the President is also requesting $4,188,000 for two ENRD initiatives—the Hazardous Materials Transportation Initiative and the Tribal Trust Fund Litigation Initiative. These initiatives, if funded, will, respectively, promote homeland security and enable the Division to effectively defend the United States against a wave of claims for billions of dollars. They would also constitute the first real increase that the Division's budget has seen in the last decade. For the reasons that I will now give, funding for both initiatives is critical.

The Hazardous Materials Transportation Initiative will help the Department achieve its top strategic goal of protecting America against the threat of terrorism by helping to prevent, disrupt, and defeat terrorist operations before they occur, and by vigorously prosecuting those who have committed, or intend to commit terrorist attacks in the United States. Experts who have considered the issue of possible terrorist targets in the wake of the September 11th attacks have identified the nation's hazardous material ("HazMat") transportation and handling system as a vulnerable area. Deaths and injuries could result from a terrorist with a fraudulent HazMat license commandeering a tractor trailer or a vessel laden with flammable or poisonous materials, as could an attack on a pipeline or other facility handling HazMat that does not have proper safety and security measures in place. The HazMat Initiative will concentrate on three tasks: 1) development of strategy and coordination with other federal, state and local agencies; 2) development of criminal prosecutions and referrals for civil enforcement actions; and 3) development and implementation of a training program to assist federal, state and local prosecutors and investigators in uncovering and prosecuting such illegal activity. These measures will effectively marshal and focus all available resources, create an immediate deterrent effect, and ensure long-term effectiveness through training of United States Attorneys and state enforcement offices around the country, and will give state and local law enforcement agencies a considerable boost in implementing counter-terrorist activities.

The Tribal Trust Fund Litigation Initiative is essential for the government to effectively defend itself in twenty-two current lawsuits brought by various Indian Tribes alleging that the U.S. has mismanaged tribal assets and failed to provide an "accounting" of the money collected, managed and disbursed by the U.S. on behalf of the Tribes. Some of these cases seek an order requiring the U.S. to perform a multi-million dollar, multi-year accounting, and others seek a money judgment for losses the Tribes claim they have suffered. In the twenty-two cases filed so far, the Tribes are claiming that they are owed more than $3 billion—and 200 to 300 other Tribes may be preparing claims for similar amounts. These Tribal Trust cases are similar to the significant *Cobell* v. *Norton* lawsuit, a class action on behalf of 300,000 individual Indians. Both Cobell and the Tribal Trust cases concern the scope of the duty owed to Native Americans for the Indian land that the government has held in trust since the late 1800s and has been used, among other things, for grazing, lodging, and oil and gas exploration. Three Cabinet officials and two other Presidential appointees have been held in contempt in *Cobell*, in part for their alleged failure to obey orders to produce documents, and further contempt charges are still pending against 37 government attorneys and managers. To avoid allegations similar to those in *Cobell* v. *Norton*, it is critical that the Department of Justice establish a team dedicated to litigating these cases. Many of them involve millions of historical accounting documents spanning more than a century of economic activity, and the issues are legally and factually complex.

This initiative will enable the Department of Justice to effectively defend the United States in the first wave of cases filed seeking recompense for Tribal Trust accounts, and maintain an adequate staffing level in our remaining non-discretionary caseload. Failure to provide sufficient resources for these cases could lead to additional allegations of contempt, substantial and unnecessary monetary awards at taxpayer expense, and a public loss of confidence in the federal government in general.

CONCLUSION

The work of the Environment and Natural Resources Division is both challenging and complex. It is vitally important to the implementation of Congressional pro-

grams and priorities regarding public health and the environment, to the protection of the public fisc, and to the advancement of the public interest generally. We have an exceptional record of assuring that polluters are made to comply with the law, that responsible private parties are made to cleanup Superfund sites rather than leaving the taxpayer on the hook, and that criminal defendants are punished appropriately. I am proud of the people in my Division, who consistently provide top-notch, cost-effective legal services to the American people and who dedicate their lives to assuring that the rule of law is met and complied with by all parties.

I would be happy to answer any questions you might have about the Division and its work.

Mr. CANNON. Mr. Schiffer.

STATEMENT OF STUART SCHIFFER, DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION

Mr. SCHIFFER. Thank you, Mr. Chairman, Members of the Subcommittee. I appreciate the opportunity to appear before you today to discuss the work of the Civil Division.

The size of our caseload and the variety of cases entrusted to us are such that it is somewhat impossible to describe in 5 minutes, so I will try to do it in a little bit less time than that.

Stripped to the barest essentials, our responsibilities can best be described as safeguarding and saving billions of dollars in taxpayer funds, recovering similarly impressive amounts for the Federal Treasury, and defending the policies and practices of the Executive Branch, and, as well, the decisions made by Congress in the form of the statutes passed by the Congress.

We, in the Civil Division, are not the initiators of Government policies, but instead, as is true of our colleagues in the U.S. Attorney's Offices, we are front-line lawyers who represent in court virtually every Government agency in the broadest conceivable array of cases.

We have only the most limited control of our caseload. Almost 90 percent of the cases are defensive; that is, they are suits brought against the Government and its officers.

Even with respect to the affirmative portion of our caseload, the discretion or control that we might be thought to have is often illusory. For example, when the Food and Drug Administration or an agency similarly situated refers to us for injunctive relief, allegations that unsafe or unhealthy drugs are being manufactured and sold illegally, or that a warehouse is contaminated, we in fact have very little option but to proceed with the case.

I would also add that almost 40 percent of our attorneys are responsible for litigation in the so-called national courts, that is, courts that have nationwide jurisdiction. The Court of Federal Claims in Washington, the Court of Appeals for the Federal Circuit, and the New York-based Court of International Trade.

Many of the cases in these courts are among our most complex. And, of course, there are no U.S. Attorneys assigned to these courts with whom we can share the caseload.

The President's fiscal year 2004 budget request for the Division includes only the most modest increases to handle first our burgeoning immigration caseload and, second, $1 million for administration of the Radiation Exposure Compensation Act.

We too have been operating under a largely static budget with a rising workload, and I believe these are minimal increases needed for us to fulfill our responsibilities in these vital area.

I started by saying I really couldn't summarize the work of the Division in under 5 minutes, and so I think I will stop at this point simply by stating my heartfelt belief that the taxpayers get a huge return of investment in the work that the Civil Division does. And I look forward to answering your questions.

Mr. CANNON. Thank you, Mr. Schiffer.

I can assure you that you will have that opportunity.

Mr. SCHIFFER. I will try to answer your questions.

Mr. CANNON. Mr. Lewis, before we recognize you, let me point out that we have Mr. Flake from Arizona, Mr. Feeney from Florida, who is also the Vice Chair of this Committee, and Mr. Chabot from Ohio has been in, and we expect Mr. Watt from North Carolina shortly.

[The prepared statement of Mr. Schiffer follows:]

PREPARED STATEMENT OF STUART E. SCHIFFER

Chairman Cannon, Congressman Watt, and Members of the Subcommittee:

I appreciate the opportunity to discuss the work of the Civil Division of the Department of Justice and our budget and resource needs for Fiscal Year 2004.

The Division represents the interests of the United States in a wide range of civil matters. Our cases encompass virtually every aspect of the Federal government—from defending the constitutionality of Federal statutes to recovering money from those who have committed fraud in connection with government programs, to the administration of national compensation programs, to the representation of Federal agencies in a host of matters that arise as part and parcel of Government operations—contract disputes, allegations of negligence and discrimination, loan defaults, immigration matters, and much more. We have 729 dedicated public servants who serve as trial attorneys in the Division and 411 full and part time employees who provide essential paralegal, administrative, and clerical support.

Over the last year and a half, the Civil Division has:

- Recovered hundreds of millions of dollars lost through fraud against health care and defense programs;
- Defended Congressional efforts to shield children from pornography on the Internet;
- Protected the public fisc from billions of dollars in claims arising from the Government's commercial activities;
- Developed the Employment Discrimination Task Force—a joint venture with the Civil Rights Division that has provided substantive guidance and training to the United States Attorneys Offices on this burgeoning area of complicated litigation.
- The Civil Division has taken on the task of assisting in the development and administration of congressional programs, such as the September 11th Victim Compensation Fund; the Division has also continued its work with the Vaccine Injury Compensation Program, and the Radiation Exposure Compensation Act.
- Further, in the months since the September 11th attacks, there has been a substantial increase in civil litigation challenging the Federal government's coordinated response to those attacks and the Administration's policies designed to prevent future acts of terrorism. The Civil Division currently has well over 60 pieces of litigation directly related to the September 11 attacks and the country's response to those attacks.

NATIONAL SECURITY

Among the laws and policies of most prominent concern to the Administration, the Congress, and the public are those involving our nation's security. We take the Attorney General's charge seriously—to prevent, disrupt, and dismantle future terrorist attacks by thinking outside the box, but never outside the Constitution. Here our role is especially critical, as Division attorneys defend challenges to the USA Patriot Act and the AntiTerrorism Act, lead efforts to freeze the assets of terrorist organizations and ensure that immigration hearings may proceed without risking harm to our Nation's counterterrorism strategy. Civil Division attorneys defend en-

forcement actions involving the detention and removal of suspected alien terrorists and defend our Commander-In-Chief in suits seeking to enjoin the country's military actions in Iraq.

While national security cases are paramount, they represent a small fraction of the over 29,000 cases and matters handled annually by the Civil Division. This vast and diverse workload is handled by our trial attorneys who spend their time on the front lines of litigation—preparing motions, taking depositions, negotiating settlements, conducting trials, and pursuing appeals.

PROTECTING THE PUBLIC FISC

Our dockets are filled with cases that involve monetary claims—the majority are claims against the Government and huge sums are at risk.

It is hardly possible to overstate the magnitude of these claims, considering that our responsibilities include: the 100+ *Winstar* suits in which some 400 financial institutions sought in the neighborhood of $30 billion for alleged losses that occurred in the wake of banking reforms enacted in the 1980s; the *Cobell* class action—perhaps the largest ever filed against the Government; and the Spent Nuclear Fuel cases where nuclear utilities allege a multi-billion dollar breach of contract against the Department of Energy for its failure to begin acceptance and disposal of spent nuclear fuel.

In these and thousands of other defensive monetary matters, our mission is to ensure that the will of Congress and the actions of the Executive Branch are vigorously and fairly defended, and that claims without merit are not paid from the public fisc. In fiscal year 2002, we defeated $17 billion in claims asserted against the United States.

In any given year about 15 to 20 percent of our cases involve affirmative litigation to enforce important Government regulations and policies, and to recover money owed the Government resulting from commercial transactions, bankruptcy proceedings, and fraud.

Cases in point include the Schering-Plough consent decree that required the company to pay $500 million for its failure to comply with FDA regulations.

In fiscal year 2002, we recovered for the United States an additional $1.9 billion and set precedents that will deter future practices designed to bilk the public coffers and the American people.

WORKLOAD TRENDS

In 2000, the Civil Division had just over 20,000 cases and matters, and a staff of 725 trial attorneys. In just three years our pending caseload grew 45 percent to just over 29,000, while the number of trial attorneys has held almost steady at 729.

During this time we witnessed significant growth in appellate cases and matters—driven largely by the steep rise in challenges to immigration enforcement actions. Cases in National courts and foreign courts continued to account for a very significant portion of our workload—some 44 percent. In contrast, the number of trial cases assigned to district courts declined both numerically and as a proportion of our total workload. Most notably, the sharpest increases are attributable to our expanding responsibilities for administering compensation programs.

ALTERNATIVES TO LITIGATION

The Vaccine Injury Compensation Program was created in 1986 by the National Childhood Vaccine Injury Act—to encourage childhood vaccination by providing a streamlined system for compensation in rare instances where an injury results. To date, nearly 1,800 people have been paid in excess of $1.4 billion. The Program's success is evident.

In FY 2002, claims filed under the Program increased more than four-fold—a rise largely attributable to claims alleging that a vaccine preservative, thimerosal, caused autism. As the Court of Federal Claims increases its staff of Special Masters, we expect further growth in vaccine-related work.

Congress has introduced several bills that could substantially increase the scope of the Vaccine Program. Most significantly, lawmakers and the Administration are examining how the United States can most fairly handle claims likely to emerge with the widescale issuance of smallpox vaccine.

To handle its vaccine caseload, the Division may spend up to $4,028,000, which is made available through a reimbursement from the National Childhood Vaccine Injury Trust Fund. The Division will continue to monitor the sufficiency of these resources.

Congress passed the Radiation Exposure Compensation Act (RECA) in 1990 to offer an apology and compensation to people who suffered disease or death as a result of the nation's nuclear weapons program during the Cold War era.

In July 2000, RECA Amendments were enacted. Among other things, new categories of beneficiaries were added, eligible diseases were increased, and the years and geographic areas covered were expanded.

The amendments resulted in over 3,800 new claims filed in FY 2001—more than in the prior six years combined. Awards rose sharply too, from an average of about $20 million a year to over $172 million in 2002 alone. Trust Fund resources were provided to pay claims via the FY 2002 National Defense Authorization Act. Similarly, for FY 2004, the President's budget requests an increase of $1,000,000 above base funding of $1,996,000 to administer the expanded program.

As backlogs mount, Congress and the Administration must take steps to ensure that limitations on administrative support do not hinder our ability to make timely payments from the recently replenished Trust Fund. To this end, the Omnibus Appropriations Act merged the RECA administration budget with the General Legal Activities (GLA) appropriation, making it possible to reprogram resources to assist in handling the onslaught of RECA claims.

However, the need to absorb pay hikes and meet resource requirements placed by our emerging counterterrorism caseload, limits our reprogramming flexibility. The requested increase will enable us to acquire contractor support to help analyze claims and work to keep payments apace with the volume of sick and dying claimants found to be eligible.

Simultaneously, the Division will monitor closely the adequacy of the caps established by the National Defense Authorization Act to ensure sufficient funds continue to be available for all eligible claimants.

The most recent addition to the Division's responsibility for compensation programs is the September 11th Victim Compensation Fund of 2001. The Air Transportation Safety and System Stabilization Act (P.L. 107–42) created the Program to pay compensation to families of deceased individuals and to those physically injured as a result of the terrorist attacks that day.

On December 21, 2001, the program's regulations were issued. Soon after, secure and private Claims Assistance Sites were opened in Manhattan and Long Island, NY; Jersey City and Edison, NJ; Arlington, VA; Boston, MA; and Stamford, CT. More than 1,800 potential claimants received assistance at these sites.

Under the leadership of Special Master Kenneth Feinberg, the Program is processing over 1,300 claims. It has paid over $200 million to claimants.

The amounts approved for deceased victims ranged from $250,000 to $6.0 million. Awards approved for physically injured (but not deceased) victims ranged from $500 to $6.8 million.

The law requires that all claims be filed by December 21, 2003. Accordingly, we expect to receive the lion's share of the 4,000 anticipated claims during the next nine months, as claimants complete and submit their applications.

To address the surge of work expected through the remaining months of the Program, the Department is expanding the contractor staff which assists the Special Master in reviewing the claims. In addition, several Federal agencies are providing Administrative Law Judges to conduct hearings for claimants who challenge preliminary compensation determinations.

For FY 2004, the President's budget seeks a total of $26 million for administration of the Victim Compensation program.

Because the enacting legislation provided a permanent and indefinite appropriation for making compensation payments, there will be sufficient funds to pay an estimated $5 billion in approved claims over the life of the program.

This Program has had to come to grips with some of the most sensitive issues of our time.

IMMIGRATION LITIGATION

The Office of Immigration Litigation (OIL) defends the Government's immigration laws and policies, and handles challenges to immigration enforcement actions. At no time in history has this mission been so important.

Immigration attorneys defend the removal of criminal aliens and challenges to critical features of the nation's counterterrorism strategy. Attorneys defend landmark cases dealing with media access to immigration hearings of individuals who have been detained in connection with the post-September 11th investigation.

Immigration has been the fastest growing component of the Civil Division's workload. Court challenges handled by the Civil Division have more than doubled in the past five years.

Accounting for this growth is the dramatic rise in the number of court cases seeking to overturn decisions regarding alien removal and detention, including those involving individuals with links to terrorist organizations.

Our cases begin when cases brought by the immigration component of the Department of Homeland Security are challenged before the Board of Immigration Appeals (BIA). Aliens appealing BIA decisions take their cases to Federal courts.

Appeals decided by the BIA have substantially increased as a result of initiatives by the Attorney General to streamline the BIA's procedures

The impact on OIL caseload has been dramatic: Between 1999 and 2002 a 40 percent increase brought the total workload to a record 7,000 cases.

These attorneys are the last line of defense in upholding immigration enforcement decisions. Any attempt to strengthen immigration enforcement must ensure that such efforts are not undermined by inadequate defense when actions are challenged in court. Such neglect would necessarily weaken National efforts to protect homeland security through an effective immigration enforcement program.

The President therefore requests in his FY 2004 budget a program increase of 30 positions (26 attorneys and four support staff), 22 FTE, and $3,500,000 for immigration litigation.

PERFORMANCE

By concentrating on the Civil Division's top priorities, this testimony provides little elaboration on the thousands of cases and matters that form the traditional core of our work.

The Civil Division has a longstanding commitment to maximizing the effectiveness of scarce Government resources. It is with pride that I can report that performance targets across the board were met or exceeded in FY 2002—as we succeeded in recovering substantial funds owed to the Government, defeating unmeritorious claims and prevailing in the vast majority of cases involving challenges to the programs of some 200 agencies that are our clients.

PRESIDENT'S BUDGET REQUEST

The President's FY 2004 request seeks 1,084 positions, 1,097 FTE and $235,553,000. Included in this request are the base resources required to maintain superior legal representation services that have yielded such tremendous success.

An increase of $1 million is needed to ensure timely and accurate payments for people injured as a result of radiation exposure during the Cold War era; and, 30 new immigration positions and a $3.5 million increase are required to protect homeland security through effective immigration enforcement.

Finally, as mentioned earlier, the President's budget includes $26 million for administration of the September 11 Victim Compensation program. This proposed decrease reflects the winding down of the program.

Mr. CANNON. Mr. Lewis, you are recognized for 5 minutes.

STATEMENT OF GUY LEWIS, DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

Mr. LEWIS. Thank you, Mr. Chairman. Members of the Subcommittee.

I, too, am pleased to appear before you today with my colleagues from the Department of Justice. I am also pleased, Mr. Chairman, that my good friend Paul Warner, United States Attorney for the District of Utah is here with us as well.

It is my honor to be here representing the outstanding women and men of the 94 United States Attorneys' Offices, and please allow me to sincerely thank you, Mr. Chairman, and this Committee and your staffs for your continued support of the United States Attorneys' mission.

I would now like to briefly outline our 2004 budget request, and highlight accomplishments of the U.S. Attorneys this past year and then some of our management goals for the future.

To carry out our mission in fiscal year 2004, we are requesting a budget of just over $1.5 billion to support about 10,200 positions.

We are seeking a little over $18 million to support an increase in 233 positions. Now, in formulating our requests, the President, the Attorney General, the Deputy Attorney General asks that we invest in programs that are critical to the Department's highest priorities.

Our fiscal year 2004 budget request complies with this directive, and includes a number of savings to help us fund the enhancements that we seek.

The request before you recognizes that the prevention of terrorism and investigation and prosecution of terrorist acts are the most important responsibilities of every United States Attorney. The convictions of John Walker Lindh, the Shoe Bomber, and a number of terrorist financiers, including several major cases in Mr. Warner's district, are just a few examples of the important work being done by U.S. Attorneys in our fight against terrorism.

Our fiscal year 2004 request also recognizes that, in addition to the pressing priority of terrorism, there are still other crime problems that we must address. One example is corporate fraud. Since the President created the Corporate Fraud Task Force in July of 2002, the U.S. Attorneys have obtained over 50 convictions of corporate wrongdoers as a result of convictions in WorldCom, ImClone, Homestore, Allfirst, and many, many others, the U.S. Attorneys have helped restore the public's confidence in the integrity of our financial markets.

Now, as additional prosecutors have been allocated to fight terrorism, gun violence, corporate fraud, a need has developed for additional support staff assistance. As a result, we are asking for 85 support staff positions, which, in reality, is a little less than one per office nationwide.

We are also asking, Mr. Chairman, for some additional help on the civil side of the house. The Civil Division in the U.S. Attorneys Office handled over 190,000 cases this past fiscal year, and collected over 100 percent of their annual budgets, a fact that we are very proud of. Our request for 60 new civil defensive positions will ensure that our offices can continue to defend the U.S. in civil actions.

Now, we recognize that stewardship of appropriated funds is a serious responsibility, and our commitment to sound management at the Department of Justice runs deep. We expect to achieve substantial savings by supporting department-wide efforts to evaluate programs and operations, and we are committed to identifying the savings necessary to help us fund the new resources we seek.

Now, with regard to sound management. At the request of Larry Thompson, the Deputy Attorney General, each U.S. Attorney has reported on the state of management in his or her district. These performance reports include accomplishments in national and district priority areas and address strategic planning in their district.

In conclusion, Mr. Chairman, the men and women of the U.S. Attorneys' Offices and the Executive Office for United States Attorneys are dedicated to fighting terrorism, protecting our neighborhoods and schools from gun violence and drug-related crimes, upholding civil rights, and prosecuting those who perpetrate corporate fraud. We believe that our fiscal year 2004 budget request is a responsible, prudent request that will allow us to maintain the im-

portant programs designed to carry out the Department's strategic plan.

Again, we truly appreciate this Committee's continued support. And I would be glad to answer any questions you may have. And I would request that my prepared long statement be included in the record.

Mr. CANNON. Without objection.

Thank you, Mr. Lewis. I thank you for introducing Mr. Warner. Paul Warner is my U.S. Attorney and has done a great job. We appreciate him in Utah and we appreciate your being here today.

[The prepared statement of Mr. Lewis follows:]

PREPARED STATEMENT OF GUY A. LEWIS

Mr. Chairman, Congressman Watt, Members of the Subcommittee, I am pleased to appear before you today with my colleagues, Thomas L. Sansonetti, Assistant Attorney General of the Environment and Natural Resources Division; Robert D. McCallum, Jr., Assistant Attorney General for the Civil Division; and Lawrence A. Friedman, Director of the Executive Office for U.S. Trustees. I am also pleased that Paul Warner, the U.S. Attorney for the District of Utah and, until recently, the Chair of the Attorney General's Advisory Committee is here. The United States Attorneys were critical in developing the budget request that is before you today.

OVERVIEW

It is an honor to be here representing the women and men of the 94 United States Attorneys' offices nationwide and I thank you on their behalf for your continuing support of their efforts. The Executive Office for United States Attorneys (EOUSA) provides support and administration for the United States Attorneys, their offices, and their staffs nationwide. EOUSA deals with issues involving the United States Attorneys' offices (USAOs), their overall operations, budgets, management, personnel matters and evaluations. In addition, EOUSA is the voice of the United States Attorneys within the Department of Justice. As such, EOUSA supports and represents the interests of the United States Attorneys, with the Attorney General's Advisory Committee, on a host of legal and policy issues presented within the Department.

The United States Attorney serves as both the chief law enforcement officer and the chief federal litigator in his or her district. The United States Attorneys and their staffs work closely with the six litigating divisions of the Department of Justice. The work of the United States Attorneys is among the most fundamental of any in the government: criminal law enforcement; affirmative civil litigation; and defending the government when it is being sued.

The top priority of the USAOs is the investigation and prosecution of terrorism. The USAOs are aggressively pursuing criminal investigations throughout the United States, preventing, and prosecuting possible terrorist-related activity aimed at the United States. Some of the important terrorism prosecutions were:

- In the *Northern District of Illinois*, the head of the Benevolence International Foundation, pleaded guilty to defrauding his investors by failing to disclose that their charitable contributions were being forwarded to finance violent jihad activities.
- John Walker Lindh pleaded guilty in the *Eastern District of Virginia* and was sentenced to 20 years imprisonment for aiding the Taliban.
- In the *District of Massachusetts* the alleged "shoe bomber" was sentenced to life in prison and ordered to pay a $2 million fine for terrorist acts, including his attempt to ignite explosive bombs located in his footwear while a passenger on an American Airlines flight. The defendant, who received Al-Qaeda training in Afghanistan, pleaded guilty on October 4, 2002.
- A Salt Lake City resident pleaded guilty in the *District of Utah* to operating an unlicenced money transmitting business, admitting that he and his associates made a series of bank transfers from Salt Lake City banks to an account at Arab Bank in Amman, Jordan, controlled by his brother.

We are also focusing on alien smugglers and disrupting alien smuggling rings. In the *District of Columbia*, a jury found one defendant guilty of illegally smuggling

aliens from Iraq to the United States through Ecuador and Colombia. He is subject to deportation upon completion of his sentence.

In addition, we are prosecuting individuals for immigration fraud. In the *District of Oregon*, a defendant , who was suspected of affiliating with the Palestinian terrorist group Hamas, was sentenced to 30 months in prison on various firearms and immigration fraud charges and ordered to pay $41,000 in restitution. In addition, the court signed an order revoking the defendant's fraudulently obtained citizenship. Searches of the defendant's home and vehicle uncovered an assault rifle, $20,000 in cash, 1,000 rounds of ammunition, a handgun, and documentary evidence establishing multiple identities, frequent foreign travel, and various frauds. A calendar seized from his home had the date September 11, 2001, marked with a red circle. The defendant admitted having received weapons and explosives training at a guerilla camp in Lebanon prior to coming to the United States at the age of 19.

The United States Attorneys have shared information with more than 6,000 federal, state and locals agencies through the 93 Anti-Terrorism Task Forces (ATTFs). The ATTFs have used Chief Information Officers, Law Enforcement Coordinators, and Intelligence Research Specialists to facilitate law enforcement information sharing at meetings and joint training sessions, and through e-mail distribution groups and telephone "trees".

After the events of September 11, 2001, the prosecution of those who perpetrated threats or violence against individuals who were perceived to be of Middle-Eastern origin became a priority of the Department. In the *Central District of California* a member of the Jewish Defense League, pleaded guilty on February 4, 2003, for conspiring to manufacture and detonate bombs at a mosque in Culver City, California, and at the field office of United States Congressman Darrel Issa, an Arab-American. A defendant in the *Western District of Washington*, pleaded guilty for attempting, two days after the September 11, 2001, terrorist attacks, to set fire to cars in the parking lot of Seattle's Islamic Idriss Mosque. He then fired at worshipers exiting the mosque and fled. The defendant was sentenced to 78 months in prison.

Another important prosecutorial focus is corporate fraud. On July 9, 2002, the President established by Executive Order the Corporate Fraud Task Force to direct the investigation and prosecution of significant cases of corporate fraud. In concert with the Department's Criminal Division, the United States Attorneys for the following districts are members of the Corporate Fraud Task Force: Southern District of New York, Eastern District of New York, Eastern District of Pennsylvania, Northern District of Illinois, Southern District of Texas, Central District of California, and Northern District of California.

In September 2002, the Deputy Attorney General convened all United States Attorneys and representatives from the other agencies represented on the task force for a Corporate Fraud Conference in Washington, D.C. Subsequently, EOUSA designed and conducted specialized training to better equip prosecutors to combat corporate fraud.

Since the inception of the Task Force, the United States Attorneys have obtained over 50 convictions. Set forth below is a small sampling of some of the more significant corporate fraud prosecutions undertaken by the United States Attorneys' Offices since the inception of the Corporate Fraud Task Force:

- In the *Southern District of New York*, the former WorldCom Comptroller and three former accounting employees pleaded guilty to securities fraud violations in connection with their participation in a scheme to defraud investors and the public regarding the financial condition and operating performance of the company. Also in the *Southern District of New York*, the Chief Executive Officer of ImClone Systems, Inc., pleaded guilty to securities fraud, conspiracy, obstruction of justice, perjury, and bank fraud.
- In the *Central District of California*, three Homestore.Com, Inc. executives pleaded guilty to fraudulently inflating the company's revenues by over $30 million through a series of transactions known as "round-tripping" in which the online real estate listing giant bought and sold services solely to increase revenue.
- In the *Northern District of California*, a jury convicted the chief financial officer of Media Vision, Inc., a Silicon Valley technology company, of a scheme to inflate the company's earnings and income and to mislead company stockholders. This conviction followed guilty pleas by four other company officials: the Chief Executive Officer, Chief Operating Officer, the Sales Vice President and the Controller.
- In the *District of Maryland*, a former Allfirst Bank currency trader pleaded guilty to bank fraud after being charged with making false entries into bank records that caused the bank to lose more than $691 million.

The variety of significant cases handled by the USAOs in areas other than terrorism and corporate fraud is remarkable. A brief description of some of the more significant recent cases is provided below. These cases reflect our prosecution of criminal and civil offenses with the goal of reducing firearms-related violence, narcotics trafficking and protecting the American people from fraud.

Through Project Safe Neighborhoods and Project Sentry, the United States Attorneys partner with local and state law enforcement and prosecutors along with federal agencies to reduce gun violence by prosecuting violators to the fullest extent possible. Examples of two cases that were investigated and prosecuted under the Project Safe Neighborhoods initiative are:

- In the *Middle District of Tennessee* a defendant was sentenced as a career offender to 21 years and 10 months in prison after a jury convicted him on charges of being a felon in possession of a firearm and possession with intent to distribute cocaine. His past criminal offenses stretched from 1974–1997.
- A defendant in the *District of Nevada* pleaded guilty to being a felon in possession of a firearm. While returning merchandise at a Wal-Mart, the defendant became confrontational and argumentative. While he was waiting in the store's security office for the police to arrive, a loaded Titan 25-caliber semiautomatic handgun dropped from his waistband onto the floor and was recovered by the store security officer. The defendant has three prior felony convictions for aggravated assaults in 1996 and 1993, and felony failure to appear in 1996.

To achieve the Department's strategic goal of enforcing federal criminal laws related to drug enforcement, the United States Attorneys' objectives are twofold. First, they seek to reduce the threat, trafficking, and related violence of illegal drugs by identifying, disrupting, and dismantling drug trafficking organizations. Second, they aim to break the cycle of drugs and violence by reducing the demand for illegal drugs. Integral to this strategy is the Organized Crime Drug Enforcement Task Force (OCDETF) program. Under this program, the efforts and expertise of federal, state, and local law enforcement agencies are coordinated in comprehensive attacks on major drug traffickers and their organizations. Several significant cases that illustrate our success in meeting these goals:

- In the *Southern District of New York* the supervisor of a Colombian narcotics trafficking organization that sent ton-quantity cocaine loads from South America to New York City, pleaded guilty to charges relating to a 5,000-kilogram cocaine load sent from Colombia via Venezuela and Mexico to New York City in late 1998 or early 1999. The defendant is the younger brother of two notorious bosses of Colombian narcotics trafficking organizations that imported thousands of kilograms of cocaine from South America into the United States during the 1990s. By 1993 or 1994, the defendant himself became directly involved in the family drug business.
- A defendant in the *District of Utah*, who directed a drug trafficking organization responsible for bringing methamphetamine, marijuana, and cocaine from Mexico through Arizona and Southern California to Utah, pleaded guilty to operating a continuing criminal enterprise. The defendant admitted to distributing approximately 80 kilograms of methamphetamine over a two-and-half to three-year period.
- In the *Western District of Texas*, two defendants were each sentenced to life imprisonment after a jury convicted them of running a continuing criminal enterprise that distributed approximately 75 tons of marijuana through the West Texas area and other parts of the United States. A third defendant pleaded guilty before trial to running a continuing criminal enterprise involving more than 30,000 kilograms of marijuana and was sentenced to 252 months in prison. More than 25 defendants connected to this drug distribution operation have now been convicted.
- In the *Middle District of Pennsylvania*, the kingpin of a global Albanian organized crime group pleaded guilty to a 55-count indictment charging him under the Racketeering Influenced Corrupt Organization (RICO) statute with a broad range of criminal offenses that generated significant income. He acquired cocaine in multiple kilogram amounts from Colombian drug traffickers, among others, and would distribute the cocaine in the United States, often hiding the cocaine in the panels of the stolen cars that his confederates drove throughout the United States. He also shipped cocaine to Europe hidden in appliances. Members of his organization also stole the identities of credit card holders, manufactured counterfeit credit cards with that information, and

then went to various stores and purchased hundreds of thousands of dollars worth of merchandise using the counterfeit credit cards.

The protection of the American people against identity theft, health care fraud, and investment fraud remain important objectives of the United States Attorneys. Several cases illustrate that commitment:

- In an identity theft case prosecuted in the *Southern District of Texas*, a Nigerian national was sentenced to 10 years in prison after pleading guilty to mail fraud and naturalization fraud for stealing the identities of 32 individuals and using the names of 30 different companies over a two-year period to open accounts with brokerage firms with the intention of causing more than $3.3 million in losses.
- In the *District of Massachusetts*, a major American pharmaceutical manufacturer was ordered to pay a criminal fine of $290 million, the largest criminal fine ever imposed in a health care fraud prosecution, and was sentenced to five years probation after pleading guilty to conspiring to violate the Prescription Drug Marketing Act in connection with fraudulent drug pricing and marketing of a drug sold primarily for treatment of advanced prostate cancer. The defendant also agreed to settle its federal civil False Claims Act liabilities and pay the federal government $559 million for filing false and fraudulent claims with the Medicare and Medicaid programs. In addition, the defendant settled its civil liabilities to the 50 states and the District of Columbia for $25 million. The total amount paid will exceed $884 million.
- In the *Western District of Missouri*, a pharmacist, who diluted drugs that had been prescribed as treatment for cancer patients, pleaded guilty to consumer product tampering, drug adulteration, and drug misbranding. He was sentenced to a term of 30 years imprisonment. The pharmacist and his corporation also were ordered to pay a fine of $25,000 and victim restitution of $10.5 million. As part of the parallel civil litigation, the Court entered a consent decree banning the pharmacist until further order of the Court from practicing pharmacy, possessing pharmacy licenses, or violating any provision of the Food, Drug, and Cosmetic Act. The assets previously frozen in the civil case were transferred to the criminal case for use as restitution by victims.
- A certified public accountant and escrow agent in the *Northern District of Ohio* was sentenced to 151 months in prison following his conviction on charges of wire fraud, mail fraud, tax evasion and money laundering related to his role as an escrow agent for two funding companies involved in fraud. During the time in question, the defendant received approximately $160 million dollars in investment funds from which he embezzled approximately $39 million. In a separate indictment, the defendant was also indicted for money laundering, involving approximately $22 million dollars. The two cases were consolidated for sentencing purposes. In addition, the defendant agreed to a $10 million dollar forfeiture order along with the forfeiture of several pieces of property.

While we have achieved considerable progress in the past year, more can be done to ensure the safety of our communities. Our Fiscal Year 2004 budget request will enable us to build on our success.

FISCAL YEAR 2004 BUDGET REQUEST

Before outlining the particulars of this request, let me make one caveat to my testimony. We are still analyzing the impact of the 2003 Omnibus Appropriations Act on our 2004 request. It is possible that some changes to the request may be required to reflect the 2003 enacted level. We will be working with the Appropriations Committee on this analysis and will keep you informed.

To carry out our mission in fiscal year 2004, we are requesting a budget of just over $1.5 billion to support 10,223 positions. The initiatives included seek an increase of 233 positions and $18,151,000.

The President, Attorney General, and Deputy Attorney General asked that we look for opportunities to re-prioritize activities before seeking new resources, that we invest in programs that are of the highest priority and greatest value, and that we abandon activities that are not effective. Our 2004 budget request complies with these requests and includes savings to help us fund the enhancements we seek.

The request before you recognizes that the prevention of terrorism and the investigation and prosecution of terrorist acts are the most important responsibilities of every United States Attorney. Our 2004 request also recognizes that in addition to the pressing priority of terrorism there are still other crime problems that must be

addressed at the federal level. To this end the request also includes resources to support the Corporate Fraud Task Force as well as other important programs.

As additional attorneys have been allocated to our offices in past years to address the strategic priorities of fighting terrorism, gun violence, and corporate fraud, a need has developed for additional support staff assistance. As a result, we are asking for 85 support staff positions, including paralegals, to begin to address the current workforce imbalance and enhance attorney productivity.

The Civil Divisions within the U.S. Attorneys' offices handled over 190,000 cases this past fiscal year and collected over 100 percent of their annual budgets through their enforcement and collection efforts. Our request for 60 new civil defensive positions will ensure that our offices can continue to defend the United States treasury in civil actions brought against government officials and agencies.

Our 2004 budget request also allows us to continue to improve our information technology capabilities to provide attorneys the tools necessary to support our prosecution efforts and civil defensive work.

We expect to achieve savings by supporting Department-wide efforts to evaluate programs and operations with the goal of achieving across-the-board economies of scale. We will be assessing potential savings through improved business practices in the area of facilities management; human resource deployment; consolidation of IT support; and the centralization of procurement for relocation services. We are committed to identifying the savings necessary to help fund the new resources we seek.

We recognize that stewardship of appropriated funds is a serious responsibility and our commitment to sound management runs deep. At the request of the Deputy Attorney General, each United States Attorney has reported on the state of management in his or her district. These performance reports include accomplishments in national and district priority areas, office administration and resource management accomplishments, and the status of strategic planning in each district. By compiling the best practices identified in the U.S. Attorneys' performance reports, as well as those discovered through our Evaluation and Review program, we will provide all U.S. Attorneys concrete examples of how to improve the operations and management of their offices.

We also seek to identify performance measurements for the U.S. Attorneys' offices that are more results oriented. To this end, the United States Attorneys' conference held at the beginning of this fiscal year was dedicated to that subject.

CONCLUSION

The United States Attorneys and EOUSA are dedicated to fighting terrorism, protecting our neighborhoods and schools from gun violence and drug-related crimes, upholding civil rights, and prosecuting those who commit corporate fraud. We believe that our FY 2004 budget request is a responsible request that will allow us to maintain the important programs designed to carry out the Department's strategic plan.

We hope to build on our successes in cooperation with this Subcommittee and with its support for the President's FY 2004 Budget request for the Offices of the United States Attorneys.

Again, I would like to thank you, Chairman Cannon, Congressman Watt and all the members of this Subcommittee for your continued support of the United States Attorneys' offices. I look forward to answering any questions that you may have at this time.

Mr. CANNON. Mr. Friedman, you are recognized for 5 minutes.

STATEMENT OF LAWRENCE FRIEDMAN, DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES

Mr. FRIEDMAN. Thank you, Mr. Chairman, and Members of the Subcommittee.

Thank you for the opportunity to discuss the work of the United States Trustee Program, which is the component of the Department of Justice with responsibility for the oversight of bankruptcy cases and trustees.

To enhance the efficiency and the integrity of the bankruptcy system, the Program carries out broad administrative regulatory

and litigation duties under both title 11 of the Bankruptcy Code and title 28 of the United States Code.

Our mandate is especially imposing in light of the significant growth in bankruptcy filings, which reached more than 1.5 million cases in fiscal year 2002. That is a 58.3 percent increase over the past 10 years. The Program is headed by the Director of the Executive Office for United States Trustees who is appointed by the Attorney General. The Director's duties include developing national Program policies and supervising field operations. I am both pleased and honored to serve in that capacity.

At Program headquarters, I am assisted by a staff of approximately 70 employees, of whom about half provide administrative support for regional and field offices.

Field operations are organized into 21 regions, each headed by a United States Trustee appointed by the Attorney General. Ninety-five field offices carry out the work of the Program in 88 judicial districts in 48 States and the territories. There are approximately 1,000 staff in the field with an average office consisting of 10 employees.

Among the United States Trustees' specific functions, we investigate and file enforcement actions to protect the system from fraud and abuse and to ensure compliance with the Bankruptcy Code.

We work closely with the United States Attorneys, the FBI, and other law enforcement agencies to help ensure prosecution of criminal violations that affect the bankruptcy system.

We appoint and supervise approximately 1,400 private bankruptcy trustees who administer cases filed under chapter 7, 12, and 13 to ensure prompt administration, financial, and fiduciary accountability, and maximize potential return to creditors. These private trustees dispersed over $5 billion in 2002.

We oversee the administration of chapter 11 reorganization cases which involve some of the Nation's leading companies to ensure financial accountability and regularity, compliance with the Code, and plans for prompt disposition.

We review applications for the employment of professionals for potential conflicts of interest, review professional fee applications, establish creditors' committees, and file motions to convert or dismiss cases. If there is misconduct or egregious mismanagement, we appoint private trustees or examiners.

The United States Trustee Program is a self-funded agency, primarily through fees collected from debtors who file bankruptcy. By statute, these fees are deposited in the United States Trustee System Fund. None of these funds, as you know, can be expended by the Program until they are appropriated by Congress annually, and no general revenues are appropriated to fund our Program.

For fiscal year 2004, the Administration has requested a Program appropriation of $175.2 million, which represents an increase of $19.4 million over fiscal year 2003.

Finally, Mr. Chairman, with regard to the OIG Report referenced in your opening remarks, let me simply say that we found the report very helpful. You will find in our response to it and, as referenced in my earlier testimony, that most of our initiatives and the action points referenced in that report had already been insti-

tuted prior to the report being issued and since I have taken the helm at the Agency on March 4th of 2002.

Mr. Chairman, that completes my remarks, and I would be happy to answer any questions you or the Subcommittee may have. Thank you.

Mr. CANNON. Thank you, Mr. Friedman.

[The prepared statement of Mr. Friedman follows:]

PREPARED STATEMENT OF LAWRENCE A. FRIEDMAN

Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to appear before you on behalf of the Department of Justice to discuss the work of the United States Trustee Program.

The United States Trustee Program (USTP or Program) is the component of the Department of Justice with responsibility for the oversight of bankruptcy cases and trustees. Our mission is to enhance the efficiency and the integrity of the bankruptcy system. We carry out broad administrative, regulatory, and litigation duties under both title 11 (the Bankruptcy Code) and title 28 of the United States Code.

Our mandate is especially imposing in light of the significant growth in bankruptcy filings which reached more than 1.5 million cases in Fiscal Year 2002. This number reflects an increase in filings of 58.3 percent over the past ten years. Most of the increase has incurred in consumer cases, but business reorganization cases continue to demand significant time and attention as the size and complexity of business and accounting issues have grown exponentially.

The Program is headed by the Director of the Executive Office for United States Trustees located in Washington, D.C. The Director is appointed by the Attorney General. Among other duties, the Director is responsible for developing national Program policies and supervising field operations. I am assisted by a staff of approximately 70 employees. About one-half of these staff members provide administrative support for regional and field offices. Field operations are organized into 21 regions, with each region headed by a United States Trustee appointed by the Attorney General. Ninety-five field offices carry out the work of the Program in 88 judicial districts in 48 states[1] and the territories.[2] Field offices are headed by career Assistant United States Trustees and assisted by career attorneys, financial analysts, paraprofessionals, and support staff. There are approximately 1,000 staff in the field, with an average office consisting of ten employees.

Among the specific functions carried out by the United States Trustee Program are the following:

- We investigate and file enforcement actions to protect the system from fraud and abuse, and to ensure compliance with the Bankruptcy Code.
- We work closely with the United States Attorneys, the FBI, and other law enforcement agencies to help ensure the investigation and prosecution of criminal violations that affect the bankruptcy system.
- We oversee the administration of chapter 11 reorganization cases, which involve some of the nation's leading companies, to ensure financial accountability and regularity, compliance with the Code, and plans for prompt disposition. We review professional employment applications for potential conflicts of interest; review professional fee applications; establish creditors' committees; and file motions to convert or dismiss. If there is misconduct or egregious mismanagement, we appoint private trustees or examiners.
- We appoint and supervise approximately 1,400 private bankruptcy trustees who administer cases filed under chapters 7, 12, and 13 to ensure prompt administration, financial and fiduciary accountability, and maximum potential returns to creditors. The private trustees disbursed over $5 billion in 2002.

In October 2001, the USTP commenced a National Civil Enforcement Initiative to address bankruptcy fraud and abuse. I described our purposes and activities in testimony delivered last month.

In summary, we undertook the National Civil Enforcement Initiative because of widespread concerns that the integrity of the bankruptcy system was being under-

[1] By statute, judicial districts in North Carolina and Alabama are not included in the United States Trustee Program. Bankruptcy courts in those districts employ Bankruptcy Administrators to carry out many of the functions otherwise conferred upon the USTP.

[2] The USTP has responsibility for bankruptcy cases filed in Puerto Rico, Guam, the Virgin Islands, and the Northern Mariana Islands.

mined by some debtors who received relief to which they were not entitled, as well as by attorneys and others who abused the bankruptcy system for illegitimate personal gain. With more than $5 billion in assets being distributed by trustees each year, and many billions more in debt discharged by consumers and corporations, the public clearly has a large stake in the proper administration of bankruptcy cases.

The National Civil Enforcement Initiative consists of two major prongs:

(1) Debtor Misconduct: Under this prong of the Initiative, the Program uncovers such improper conduct as inaccurate financial disclosure, concealment of assets, "substantial abuse," and misuse of social security numbers by those who seek the discharge of debts despite an ability to repay. The primary civil remedies sought by Program attorneys are dismissal under 11 U.S.C. §§ 707(a) and (b) and denial of discharge under § 727.

(2) Consumer Protection: The Program also seeks to protect debtors and creditors who are victimized by those who mislead or misinform debtors, file bankruptcy petitions without a debtor's knowledge, make false representations in a bankruptcy case, or commit other wrongful acts in connection with a bankruptcy filing. Primary targets are unscrupulous bankruptcy petition preparers and attorneys. The primary remedies sought are fines and injunctions under 11 U.S.C. § 110, disgorgement of fees under § 329, and other sanctions.

The results of our first year after implementing the National Civil Enforcement Initiative are dramatic. During Fiscal Year 2002, field offices reported taking more than 50,000 civil enforcement and related actions (including cases resolved without resort to litigation) that resulted in an overall potential return to creditors of approximately $160 million.

The United States Trustee Program is a self-funded agency. The USTP is funded primarily through fees collected from debtors who file bankruptcy. By statute, these fees are deposited into the United States Trustee System Fund. None of the funds can be expended by the Program until they are appropriated by Congress annually, and no general revenues are appropriated to fund the Program.

Revenue in excess of the annually-appropriated amount remains in the System Fund. The monies appropriated typically total less than the monies collected. At the end of Fiscal Year 2002, the System Fund held $186,345,311 in funds not appropriated for Program use.

For Fiscal Year 2004, the Administration has requested a Program appropriation of $175.2 million, which represents an increase of $19.4 million or 12.5 percent over the Fiscal Year 2003 operational level.

Consistent with the President's Management Agenda and statutory mandates, the Program has taken a number of performance-based management reforms. We are committed to improving our ability to identify agency goals and to measure our progress in reaching those goals. These reforms include the following:

- We developed a "Significant Accomplishments Reporting System." This System includes a new data base to measure approximately 100 work elements, including motions filed and informal enforcement actions not leading to litigation, and the results achieved. We are now better able to record and track specific enforcement and case administration activities at the time they occur. To improve the reliability of the System, and to ease the associated administrative burden, the System has been completely automated. The automated System will be fully operational in all field offices by May 1, 2003, having been developed, piloted, and provided to the field offices in less than one calendar year. The System will continue to be refined and improved in the future.
- We revamped our budget submissions under the Government Performance and Results Act (GPRA) to better reflect the costs and benefits associated with various program activities. We are continuing to review our GPRA and related measures so that we can more fully integrate management and budgeting functions.

That completes my prepared remarks, and I would be happy to answer any questions you and the Subcommittee members may have.

Mr. CANNON. Since I expect we will do a couple of rounds here, I would normally defer to others for the first questioning if we only had one round of questions, but I tend to take the first questioning, unless either of my Members here would like to go first.

Do either of you have something you have to get to?

Thank you. Then if you don't mind, I will begin with some questioning.

First, Mr. Sansonetti, directed to you. And perhaps Mr. Schiffer you will have something to add on these points. Regarding the Cobell versus Norton case, what is the relationship between the Indian Tribal Trust cases being handled by the Environment Division and the Cobell being handled by the Civil Division? Why was the change made as to the division representing Cobell, and how does this relate to the increase in funds which ENDR is requesting for Tribal Trust Fund case defense?

Mr. SANSONETTI. Well, Mr. Chairman, the Cobell case is a class-action lawsuit, which is supposedly constituting all the past and present individual Indian money accounts. There are some 300,000 individual money accounts that are at stake in that case.

In contrast, the Tribal Trust cases, which are in the Division, are brought on behalf of tribes and not the individual Indians. There are 22 of those cases at the present time while there is over 470 Federally recognized tribes in the United States, and so I anticipate that the number of cases will go up from 22 in the future.

We have—in relation to the question as to why we are asking for the additional monies, we have at the present time in our General Litigation Section, the attorneys that defend these Tribal Trust cases, there are only eight of them. They are already handling the 22 cases. The Civil Division has been good enough—and this is before my time—as to take over the Cobell case on the individual accounts. And so we work with the Bureau of Indian Affairs and the folks in the Department of Interior including their Solicitor's Office in developing the defense for those cases.

I would also note that there is a difference in the type of cases that are involved in the fact that the Cobell suit is a strict APA case asking for an accounting, how much was supposed to come to us, how much did come to us. And they, basically, allege a failure to perform a nondiscretionary duty.

In the Tribal Trust cases, not only do you have the APA allegations, but you also have allegations of asset mismanagement, that the highest royalty figure was not obtained for a certain natural resource found on a particular reservation.

So, the suits may be just simply the tip of the iceberg as far as those 22 are concerned. Some of them are in the Court of Federal Claims, which of course then requires appeals to the Federal Circuit. Others are before various U.S. District Judges, about eight of the 22 having been assigned to Judge Lamberth, who also has the oversight over the Cobell case.

Mr. CANNON. Was there any conflict of interest in the ENDR that caused the move over to Civil?

Mr. SCHIFFER. There were concerns of that sort, Mr. Chairman. There were contempt motions being filed or motions seeking the imposition of contempt sanctions against, actually, two successive teams of attorneys in the Environment Division and a number of officials in Interior.

I should add that similar allegation have been made against almost anyone who comes near the Cobell case, including all of the attorneys in the Civil Division that worked on it, and then, in a

statement putting everything on the table, I have personally been among the lawyers sanctioned by Judge Lamberth.

We have been obtaining waivers from the appropriate officials to permit us to continue, because we are simply at a point where it makes no sense and would be unfair to the United States for us to seek yet another team of lawyers to handle the case.

Mr. CANNON. Would you describe what you mean by personally sanctioned?

Mr. SCHIFFER. I hate to go into great detail about the inglorious end of my 40-year career at the Department, but in December I was, or I think, six of us were referred, to the Disciplinary Committee of the United States District Court for the District of Columbia for what the judge regarded as inappropriate conduct by attorneys.

In February, an order was entered where approximately the same number of attorneys and largely overlapping names were ordered personally to pay the plaintiffs' costs of engaging in certain discovery. A similar order was entered in March.

Mr. CANNON. Thank you.

Do you know, Mr. Schiffer, Mr. Sansonetti, of any other judges in the history of America who have held any Secretaries of any department in contempt?

Mr. SCHIFFER. I do not.

Mr. SANSONETTI. I do not.

Mr. CANNON. We took a brief look. I am glad to have such a wise counsel at this point. I don't think so. And I think we have here a judge who has held four Secretaries in contempt. And Mr. Schiffer, I want to come back to who else was held or sanctioned, and what that does to your job. But my time has run, and consistent with my habit, we are going to yield back and call on the gentleman from Florida, Mr. Feeney, if he has questions.

Mr. FEENEY. Well, Mr. Chairman, my time is your time. And if you would like to continue along your line of questioning, I am fascinated by it, and I will pick up when you are through.

Mr. CANNON. Thank you. We will go to a second round of questioning then, and we will continue this discussion.

You had mentioned that six other people were sanctioned. Were those members of your Division or ENDR?

Mr. SCHIFFER. These are all Civil Division attorneys.

Mr. CANNON. Was anybody sanctioned on the ENDR side?

Mr. SCHIFFER. There are pending proceedings that we are handling, and private counsel are handling involving, I think, some five dozen individuals by now in the Environment Division and the Department of Interior.

Mr. SANSONETTI. So it is both.

Mr. CANNON. What, now I—do I understand, Mr. Schiffer, what you said was these cases were moved, this case was moved from the ENDR to your Division because of concern on the part of the lawyers in ENDR that they would be subject to sanction?

Mr. SCHIFFER. And I think departmental administration thought that it might make sense to get a fresh team of lawyers in the case, which was something I wish they could reconsider at this time.

Mr. CANNON. I suspect that you might feel that way. Can you tell me a little bit about the sense of concern among your attorneys who are subject to the sanctions?

Mr. SCHIFFER. It is, obviously, not something pleasant.

We are a mix of very senior people who have had long, if not illustrious, but have had long careers and have never before been sanctioned in any form nor had sanctions been sought against us either by a judicial body or professional association. And then, at the other end of the spectrum, at least one or two of the very youngest attorneys, who are just beginning their careers and are understandably very, very concerned about what they regard as serious reputational damage that has already occurred.

Mr. CANNON. And I met with a Former Deputy Solicitor in the former Administration, the Deputy Solicitor from the Interior Department who left because of the sanctions.

Are either of you aware—that is, he left public service because he was concerned about what these sanctions would do to him professionally and personally and from the point of view of his long-term career. Are either of you aware of others who have left public service in either the Justice Department or the Interior Department because of these sanctions?

Mr. SANSONETTI. I am not. Of course, I have just been there a year. But I can tell you that within the shop of our 400 attorneys, there is hardly a line standing outside my door to sign up to defend the Tribal Trust cases. And with 22 of those already on our plate and more yet to come, you can see why the eight attorneys that are assigned these defenses are already relatively overwhelmed.

Mr. SCHIFFER. I should add, I am also aware of people who had seemed very interested in joining us as new attorneys in the Division and who have asked the right questions and been told about the Cobell case and have declined our offers, telling us that it is because of the likelihood they might have to work on the case that they have decided not to join the Civil Division.

Mr. CANNON. So you can't get your senior guys to do it, and you can't get new guys to come in.

Mr. SCHIFFER. Well, it speaks to the wisdom of the people that we try to recruit.

Mr. CANNON. At least they are smart enough to recognize the problem. Can you give us an idea of how many people have looked at this and decided it is too difficult?

Mr. SCHIFFER. I don't know the number, but I have heard from time to time.

Mr. CANNON. Shifting gears just a little bit here. There are, apparently Ernst and Young did an audit that cost something in the neighborhood of $20 million. Are either of you familiar with that? And was that ordered by the Court or did Interior do that on their own?

Mr. SCHIFFER. Well, it is a mix, Mr. Chairman. The Court had ordered very, very extensive discovery involving just massive numbers of documents. There was controversy in the case over whether the documents were sufficient to permit accounts to be reconciled, whether all relevant documents had been produced. And the Interior Department undertook, with respect to the five named plaintiffs, to have Ernst & Young go back and see if it could account for

the money coming in and out of the accounts, and Ernst & Young did so.

Mr. CANNON. My understanding is that they found a—no misplacement, a decimal point here—a $60.94 problem after a $20 million inquiry? Are you familiar with that?

Mr. SCHIFFER. Yes, sir. That is my understanding, as well.

Mr. CANNON. Well, nice to know we have books, I guess.

Secretary Norton was ruled in contempt of court last December for deceiving Judge Lamberth about the DOI's failure to reform a trust fund for Native Americans, and ordered DOI to reappear in May to explain and rectify further accounting problems relating to the Cobell case.

Could you explain, either of you, for the Subcommittee to what efforts have been made or are currently under way to conform to Judge Lambert's ruling and avoid any subsequent contempt rulings being directed at Secretary Norton and other staff and other Secretaries?

Mr. SCHIFFER. Well, I probably shouldn't discuss the contempt rulings at length. They are being argued on appeal in just a few weeks, April 24, in the United States Court of Appeals for the District of Columbia Circuit.

I do know personally the Secretary has devoted enormous amounts of her own time and that of her senior staff in dealing with this litigation.

Mr. CANNON. If I might, Mr. Schiffer, can I just interject and say that I serve on the Resources Committee.

I preceded Mr. Sansonetti in the Solicitor's Department. I am close to Interior people, I am very close—the people who are now running the Department are people who were there when I was there, and they are busting their guts to deal with this lawsuit, and it is keeping them from doing and implementing the policies of this President and the people of America. And that is my soap box, but I am more aggravated than I can say about this, and I hope that doesn't come through in the tone of my questions.

But let me just ask to follow up on one issue. You point out that you are reluctant to talk about a matter that is under appeal. And, you know, this is not the Appellate Court; this is another branch of Government. And it seems to me we find ourselves—and I would like you to both comment on this—with you as members of the Executive Branch uncomfortable talking with members of the Legislative Branch, who happen to have particular concerns about this very subject matter because you have got a Member of the Judiciary who has subjected you, Mr. Schiffer, personally to contempt citations. And it seems to me that we have a little bit of a conflict among the three branches here.

I would very much appreciate your opinions, if you are courageous enough. I shouldn't say that. That is unfair. I know you are courageous enough. If you feel you could comment on that.

Mr. SCHIFFER. I wasn't really trying to avoid discussion of the case with the Chairman.

I did start by announcing I had been sanctioned three times. So if I am a little bit reluctant to—I mean, I have only limited assets available, so I suppose at a certain point I shouldn't care, but I know that others do.

And part of my motivation, in saying I was reluctant to discuss the issues, is that I am sure my colleagues who are going to argue the appeal would much prefer to do so themselves than have me butcher them.

But the Chairman was not exaggerating at all when you talked about the amount of time that senior managers, including the Secretary herself, have been devoting to this case. She is just an extremely sincere individual. And so the notion that she is doing anything to place herself arguably in contempt of the Court is certainly foreign to me. The Court has ruled otherwise, and this is why we have courts of appeal.

Mr. CANNON. Can you give us counsel on what this Branch should do to oversee what this judge is doing in this process?

Mr. SCHIFFER. I am obviously the one who needs counsel. There may well have to be a legislative solution to the case itself at a certain point. I cannot give the Chairman counsel, I think, on the judge as an individual. That is again why we have courts of appeal. We seek redress in those courts.

Mr. CANNON. The courts of appeal are the judicial process for correcting errors. We also have other corrective measures, but it is not fair, I don't think, to ask you to comment on that.

Mr. SCHIFFER. Article 3 of the Constitution is a wonderful thing, Mr. Chairman. It appoints judges for life as long as they engage in good behavior. And it is not for me to I think try to discuss what constitutes good behavior at this point.

Mr. CANNON. It occurs to the mind that there are actually many levels of checks and balances here which we need to consider.

But I do want to pursue just one other issue, if the gentleman from Florida wouldn't mind, because it was so very difficult for many people. That is, that apparently Joseph S. Kieffer, III, was appointed by Judge Lamberth as Special Master Monitor to the Cobell case.

He hired a team of computer hackers in order to test the security of DOI's computer systems, specifically those which contained information relating to the Tribal Trust accounts. As a result, Judge Lamberth ordered the subsequent shutdown of DOI's computer system until the Tribal Trust information could be verified as secure. And, that through this there was a massive blackout of DOI's computer ability, that is its web presence and its information capabilities. My office worked closely with DOI. We couldn't get information from them. And when we called them, which is, of course, the awkward way to do it, we couldn't get the information because of their blackout. And, that to this date, there is still some component of DOI's computer network which is not up and running including the Bureau of Indian Affairs.

Could you please explain how much longer you expect this situation to continue and what efforts are under way within DOI or DOJ to comply with this order? And also, is it true that subsequent to Judge Lamberth's order, that DOI was actually rendered unable to send out royalty checks, royalties to tribes and individuals under the Trust Account for 2 months?

Mr. SCHIFFER. I should start, I suppose, by noting there are two Special Masters that the Court has appointed and who are being

paid for at Government expense. I would add, Mr. Kieffer is one of them. Alan L. Balaran is the second one.

It was Mr. Balaran, who with the Court's approval in the form of an order that had been entered, even though we had not known about it, hired a company to tap into essentially the Interior Department computers. I think that about 95 percent of them are now back online.

It is also accurate that there was a period where checks were delayed. That problem has been taken care of, and I think all the checks are current.

Mr. CANNON. Are you aware of any of the personal problems that were caused by checks not being delivered either of you?

Mr. SANSONETTI. I, personally, am not.

Mr. SCHIFFER. I have certainly heard about them. And, of course, there were other problems, such as people being unable to gain access to National Park Service websites and the like.

Mr. CANNON. Those were greatly inconvenient, I might say. I see that my time has actually expired.

We note that Mr. Watt has joined us, and if you will allow Mr. Watt, we have done an extended questioning here that I participated in. But Mr. Feeney has been gracious enough to let me do that. Would you mind if we yield 5 minutes to him?

Mr. WATT. Go right ahead.

Mr. CANNON. Mr. Feeney, you are recognized for 5 minutes.

Mr. FEENEY. Well, thank you, Mr. Chairman.

I was fascinated by your discussion of a case that I was unfamiliar with, the Cobell case. And I obviously can't opine in view of the facts of the case or the participants or the counsel on either side. It is sort of amazing that one Federal judge apparently can shut down or immobilize the better part of a department including a half-dozen or a dozen attorneys and as many as 60 people that feel under some sort of threat, which doesn't by the way opine as to whether or not the behavior of any individual or the entire Justice Department for that matter has been appropriate. But I guess I had a couple questions.

Has there been any effort to ask the judge to recuse? Is it him? Is Royce a mister?

Mr. SCHIFFER. Judge Lamberth? Yes.

Mr. FEENEY. Okay. Any effort to ask the judge to recuse himself given his obvious—I mean, something has gotten the judge's ire, either rightfully or wrongfully, and he has now threatened between one and five dozen employees of the United States Government.

Mr. SCHIFFER. A number of private counsel representing individuals against whom sanctions have been sought, contempt sanctions largely, have filed such motions, Mr. Feeney.

Mr. FEENEY. So that in addition to the dozen or five dozen public counsel, there are private counsel that have been apparently subjected to the same——

Mr. SCHIFFER. I am sorry. I think I am confusing things. There have been private counsel retained at Government expense to represent the interests of the individuals, because the determination was made that the sanctions were being sought as a result of the performance of their official duties.

Mr. FEENEY. And so there has been some suggestion or formal request for the judge to consider recusing himself?

Mr. SCHIFFER. That is correct.

Mr. FEENEY. And he hasn't responded to that yet?

Mr. SCHIFFER. That is an issue that is now also pending before the Court of Appeals.

Mr. FEENEY. Has there been any effort to discipline the judge based on his judicial canons, been filed as a formal matter?

Mr. SCHIFFER. I am not aware of anything of that sort.

Mr. FEENEY. Well, of course, the Chairman asked rhetorically, and I understand that sometimes we ask the Executive Branch for advice, but ultimately in separation of powers issues, you are probably not the court of last resort in terms of article 1 powers. And you suggested the importance of article 3, I happen to believe that, too, but I also like article 1, especially now that I am in Congress.

And it seems to me that at a minimum that Congress has the right to set the jurisdiction of Federal judges. Harassing several dozen members of the Justice Department seems to be something that we could effect with our jurisdictional powers. And you may or may not have an opinion on that. And then ultimately, of course, there is the question of the judge's good behavior. And so this is something I intend to look into. And, again, I have no opinion about the facts. I have no opinion about the behavior of individual counsel or anybody in the Judicial Department, but it does seem to me that we have got a significant portion of our Justice Department paralyzed by one Federal judge that somebody, somewhere has got to answer as to whether or not the judge has behaved appropriately.

And you can comment on that if you would like, Mr. Sansonetti, but if you would prefer not to, I understand that, too.

Mr. SANSONETTI. Well, I think the topic that you are discussing is probably important from the standpoint of why we are here asking for the additional monies today. Because ultimately it is the Congress's job to make sure that you appropriate only the necessary monies from the public fisc for our duties.

And the amount that I am asking for is an additional $3 million for my Tribal Trust initiative. That may be able to garner me 15 attorneys with some support staff, a couple legal secretaries. Add that to the eight folks, that is still maybe 23 attorneys handling 22 cases. You know, usually you would have law firms, whole law firms assigned to a case of this magnitude. If you add up the dollars that are being sought by the tribes, we are in the billions.

So if the cases are not litigated properly, then the public fisc is at risk.

And so the reason I made that reply to the Chairman about this 22 cases—these 22 cases being the tip of the iceberg is, in my case, these Tribal Trust cases have been filed say maybe since 2001, 2002. Mr. Schiffer's Civil Division has been dealing with the Cobell case for years now. You know, what if another 22 are filed next year? Another 10 this year?

So I am going to have to come back to you as long as this is going on each and every year to ask for an increase, because just like eight attorneys is not enough to handle 22 cases, I can already see that 23 attorneys is hardly going to be enough, either, if we get

additional cases added too. And given that eight of these cases are also in front of Judge Lamberth, there are going to be a whole series of things that we are going to have to do to comply with discovery, et cetera, that are going to be very time consuming.

And, needless to say, if people fall behind or are having difficulty getting their arms around the scope of the discovery, then there are potential sanctions down the road as well.

Mr. FEENEY. Mr. Chairman, if I could have unanimous consent for one more short question? I don't know how long the answer will be.

Mr. CANNON. Without objection.

Mr. FEENEY. To finish up this line of thought. To the extent that individuals in the Justice Department have had to hire private counsel to protect their interests and to the extent that they may be found innocent or whatever civil or criminal sanctions the judge or others would bring, will the taxpayers be obligated to reimburse individual attorneys in the Justice Department?

Mr. SCHIFFER. At this point, Congressman, I think that all of the attorneys are being paid for by the Department of Justice by taxpayer funds.

Mr. FEENEY. Okay. Thank you.

Mr. CANNON. The gentleman yields back.

Mr. Watt, would you like to question?

Mr. WATT. I just wanted to say to the witnesses that I apologize for not being here. We had a Rules Committee hearing that was going on in a case that is coming to the floor either tomorrow or Thursday, and I was required to be there.

So I don't have any questions. I will look at the transcript and look at your testimony, and but it is certainly was not out of a lack of regard for the importance of what you are doing here. I know that it is very important, but it is still impossible to be in two places at one time.

Thank you. I yield back.

Mr. CANNON. Thank you, Mr. Watt.

We have tried your patience sorely on a pretty narrow issue. I apologize for that. We have a number of questions that transcend the ability and the timeframe of this hearing to ask, so we will ask those questions in writing and if you could respond in writing that would be very helpful.

There are a number of issues out there that are very serious. For instance, my understanding is that you have got about 60 percent of your Environmental Division's cases that are defensive and therefore they are essentially nondiscretionary. Is that enough?

So we are going to ask those kinds of questions. We will appreciate your response to those. And I want to thank you all for coming today, and the Committee will be adjourned.

[Whereupon, at 3 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THEODORE B. OLSON

Mr. Chairman and Members of the Subcommittee: Thank you for inviting me to present this written testimony regarding the Office of the Solicitor General in connection with the Committee's hearing.

I. THE SOLICITOR GENERAL'S DUTIES

When Congress created the position of Solicitor General in 1870, it expressed high ambitions for the Office: the Solicitor General is the only officer of the United States required by statute to be "learned in the law," 28 U.S.C. Section 505, and the Committee Report accompanying the 1870 Act stated: "We propose to have a man of sufficient learning, ability, and experience that he can be sent . . . into any court wherever the Government has an interest in litigation, and there present the case of the United States as it should be presented."

In modern times, the Solicitor General has exercised responsibility in three general areas.

1. The first, and perhaps best-known, function of the Solicitor General is his representation of the United States in the Supreme Court. The late former Solicitor General Erwin Griswold captured the nature of this responsibility in observing:

> The Solicitor General has a special obligation to aid the Court as well as serve his client. . . . In providing for the Solicitor General, subject to the direction of the Attorney General, to attend to the "interests of the United States" in litigation, the statutes have always been understood to mean the long-term interests of the United States, not simply in terms of its fisc, or its success in particular litigation, but as a government, as a people.

This responsibility, of course, includes defending federal statutes challenged as unconstitutional on grounds that do not implicate the executive branch's constitutional authority when a good faith defense exists. The Solicitor General also defends regulations and decisions of Executive Branch departments and agencies, and is responsible for representing independent regulatory agencies before the Supreme Court.

The Supreme Court practice of the Solicitor General includes filing petitions for review on behalf of the United States. In this regard, as the Supreme Court has stated:

> This Court relies on the Solicitor General to exercise such independent judgment and to decline to authorize petitions for review in this Court in the majority of the cases the Government has lost in the courts of appeals.

The Solicitor General also responds to petitions filed by adverse parties who were unsuccessful in the lower federal courts in criminal prosecutions or civil litigation involving the government. Where review is granted in a case in which the United States is a party, the Solicitor General is responsible for filing a brief on the merits with the Court and he or a member of his staff presents oral argument before the Court. The Solicitor General also files *amicus curiae*, or friend-of-the-court, briefs in cases involving other parties where he deems it in the best interest of the United States to do so. Although most *amicus* filings occur only after review has been granted, the Solicitor General also submits *amicus* briefs at the petition stage when invited by the Court to do so or, in rare instances when Supreme Court resolution of the questions presented may affect the administration of federal programs or policies. The Solicitor General generally seeks and receives permission to participate in

oral argument in those cases in which the government has filed an *amicus* brief on the merits.

2. The second category of responsibilities discharged by the Solicitor General relates to government litigation in the federal courts of appeals, as well as in state, and sometimes even foreign, appellate courts. Authorization by the Solicitor General is required for all appeals to the courts of appeals from decisions adverse to the United States in federal district courts. The Solicitor General's approval is also required before government lawyers may seek *en banc*, or full appellate court, review of adverse decisions rendered by a circuit court panel. Additionally, government intervention or participation *amicus curiae* in federal appellate courts (as well as state or foreign appellate courts) must be approved by the Solicitor General. In addition, once a case involving the government is lodged in a court of appeals, any settlement of that controversy requires the Solicitor General's assent. In cases of particular importance to the government, lawyers from the Office of Solicitor General will directly handle litigation in the lower federal courts. Recent examples include the *Microsoft* antitrust appeal, important criminal procedural issues when addressed by the courts of appeals en banc, and cases involving enemy combatants.

3. In the third category of responsibilities are decisions with respect to government intervention in cases where the constitutionality of an Act of Congress "affecting the public interest" has been brought into question at any level within the federal judicial system. In such circumstances, 28 U.S.C. Section 2403 requires that the Solicitor General be notified by the court in which the constitutional challenge has arisen and be given an opportunity to intervene with the full rights of a party.

The various decisions discussed above for which the Solicitor is responsible are arrived at only on the basis of written recommendations and extensive consultation among the Office of the Solicitor General and affected offices of the Justice Department, Executive Branch departments and agencies, and independent agencies. Where differences of opinion exist among these components and agencies, or between them and the Solicitor General's staff, written views are exchanged and meetings are frequently held in an attempt to resolve or narrow differences and help the Solicitor General arrive at a final decision. Where consideration is given to an amicus curiae filing by the government in non-federal government litigation in the Supreme Court or lower federal appellate courts, it is not uncommon for the Solicitor or members of his staff to meet with counsel for the parties in an effort to understand their respective positions and interests of the United States that might warrant its participation.

II. ORGANIZATION OF THE SOLICITOR GENERAL'S OFFICE

The Office of the Solicitor General has a staff of 48, of which 22 (including the Solicitor General) constitute its legal staff and the remainder serve in managerial, technical, or clerical capacities. Of the 22 attorneys, four are Deputy Solicitors General, senior lawyers with responsibility for supervising matters in the Supreme Court and lower courts within their respective areas of expertise. Seventeen attorneys serve as Assistants to the Solicitor General. Sixteen are assigned a "docket" of cases presenting a wide spectrum of legal problems under the guidance and supervision of the Deputies. One of these assistant positions is currently vacant. The seventeenth, the Tax Assistant, is a senior lawyer who devotes himself almost entirely to litigation arising under the Internal Revenue Code. Additionally, OSG employs four lawyers who are recipients of the Bristow Fellowships, a one-year program open to highly qualified young attorneys, generally following a clerkship with a federal court of appeals' judge. Bristow Fellows assist the Deputies and Assistants in a variety of tasks related to the litigation responsibilities of the Office. All of the attorneys in the Office have outstanding professional credentials.

The authorized personnel levels and budget of the Office of the Solicitor General have remained relatively stable in recent years. Fiscal Year 2003 funding level is 49 workyears and $7,656,000. About 90% of the Office's budget pertains to nondiscretionary items. For example, approximately 75% is devoted to personnel and personnel-related costs, 12% to GSA rent, and 3% to printing.

To offset otherwise rising costs, the Office has realized savings by moving from reliance on outside printers to an in-house desktop publishing operation.

III. OFFICE WORKLOAD

The following statistics may provide a helpful way of measuring the Office's heavy workload given the relatively small staff of attorneys. During the 2001 Term of the Supreme Court (June 30, 2001 to June 28, 2002), the Solicitor General's Office han-

dled approximately 3657 cases in the Supreme Court. We filed full merits briefs in 66 cases considered by the Court (and presented oral argument in 65 of those cases),[1] which represented 83% of the cases that the Supreme Court heard on the merits in that Term. The government prevailed in 84% of the cases in which we participated. We filed 23 petitions for a writ of certiorari or jurisdictional statements urging the Court to grant review in government cases, 450 briefs in response to petitions for certiorari filed by other parties, and waivers of the right to file a brief in response to an additional 3108 petitions for certiorari. In response to invitations from the Supreme Court, we also filed 10 briefs as *amicus curiae* expressing the government's views on whether certiorari should be granted in cases in which the government was not a party. The above figures do not include the Office's work in cases filed under the Supreme Court's "original" docket (cases, often between States but involving the federal government, in which the Supreme Court sits as a trial court), and they also do not include the numerous motions, responses to motions, and reply briefs that we filed relating to matters pending before the Court.

During this same one-year period, the Office of the Solicitor General reviewed more than 2145 cases in which the Solicitor General was called upon to decide whether to petition for certiorari; to take an appeal to one of the federal courts of appeals; to participate as an amicus in a federal court of appeals or the Supreme Court; or to intervene in any court. In the past year, lawyers from the Office of Solicitor General personally handled an additional 5 arguments in the courts of appeals and another 5 major arguments in the district courts. Thus, during this one-year period, the Office of the Solicitor General handled well over 5802 substantive matters on subjects touching on virtually all aspects of the law and the federal government's operations.

IV. CONCLUSION

In carrying out the foregoing responsibilities, my staff and I have productively and efficiently adhered to the time-honored traditions of the Office of the Solicitor General—to be forceful and dedicated advocates for the government, as well as officers of the Court with a special duty of candor and fair dealing.

[1] Of the 66 merits briefs filed, some were consolidated resulting in 1 oral argument.

April 10, 2003

The Honorable John Ashcroft
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

IN RE: Follow up to the Department of Justice Oversight Hearing before the Subcommittee on Commercial and Administrative Law

Dear. Mr. Attorney General:

I want to extend to you the gratitude of the Members of the Subcommittee on Commercial and Administrative Law, and my personal thanks, for the appearance of your representatives at our hearing on reauthorization of the Department of Justice on April 8, 2003. Their testimony, and the efforts made in order to present it, were deeply appreciated and will help guide us in future action.

Unfortunately, time did not allow for the Subcommittee to ask all of the questions which it had hoped to during the hearing. As a result, and in order to complete the record of this hearing, I am submitting these additional questions in writing for those who represented components of your Department so that we may better understand those components and the issues they face. We eagerly await your responses to the following:

Questions for the Environment and Natural Resources Division:

1) Regarding the case of Cobell v. Norton, could you please details as to how many staff and officials from both the Department of Justice (Environment and Natural Resources Division and Civil Division) and the Department of Interior have been charged with Contempt of Court or had sanctions placed upon them? In addition, could you provide

list of how many staff and officials have required private counsel in this matter? Finally, could you provide how much in fines or other penalties the personal sanctions which have been levied against staff and officials associated with the Cobell case cost in totality and individually?

2) As reported on August 23, 2002 in The Arizona Republic, "Tommy DeJong thought he was a lucky man when a federal agency helped him build a wastewater system for his Buckeye Dairy Farm". Instead, Mr. DeJong suffered through years of prosecution and criminal charges brought forward by criminal investigators from the EPA and United States Attorney. Mr. DeJong had relied on plans which were part of the U.S. Department of Agriculture's Soil Conservation Project. In fact, DOA paid $15,000 towards the eventual $150,000 cost for the waste run-off system that was needed. Subsequently, the design was so flawed that it cost Mr. DeJong $600,000 to correct the errors in DOA's plan. EPA did not think this was enough, and sought a six year jail sentence to punish Mr. DeJong for his reliance upon DOA. The subsequent prosecution was not only found to be baseless (possibly in a large part based on potential perjured testimony from a government witness), but DeJong was able to successfully file for legal fee and cost reimbursement through the Hyde Amendment. The Hyde Amendment, as you know, allows courts to order payments for attorney fees and costs if a case is filed which was vexatious, frivolous, or in bad faith. Mr. DeJong was ruled in order, and was able to collect $205,000 in fees and costs. It was the first successful claim under the Hyde Amendment in Arizona's history.

   A) What role did ENRD have in this matter?

   B) Realizing that this prosecution occurred under a different administration, do you have any explanation as to why this matter was taking to such lengths in being prosecuted? What has been done since DeJong to insure that baseless prosecutions such as these are reviewed prior to filing and can help to avoid any more successful claims under the Hyde Amendment from being upheld against the United States?

3) Our National Parks are places of great beauty, national pride, and recreation. Unfortunately, lately they have also been a place of increased criminality. Public lands, especially those which share a national border, have shown evidence of poaching of animals and timber, areas of access for illegal immigrants, are potential avenues for terrorist activity and perpetrators, and are used by manufacturers and traffickers of drugs. What resources within your Division are used for the purpose of prosecution of these criminal activities on Public Lands? Do you believe that there are sufficient amounts of law enforcement in these areas, or is more necessary?

4) How would you describe the differences in your Division's approach to Property Rights and Takings under the Bush Administration? In what ways has it changed since the Clinton Administration, and if it has not, why?

5) I find it hard to believe that the Environment Division did not receive any budget increases during the Clinton Administration. Can you explain what you mean when you say that FY04 would be the 1st year of "real" budget increases for the Division in a decade?

6) What is the role of the Department of Transportation in the hazardous materials transportation initiative?

7) I understand that 60% of the Environment Division's cases are defensive and therefore nondiscretionary. Are there sufficient resources for both civil and criminal enforcement efforts within the Division?

8) In the last Congress you testified before this subcommittee on the so-called Rails-to-Trails cases. What has changed in the intervening year?

Questions for the Civil Division

1) **Office of Immigration Litigation/Decentralization:** In response to the Subcommittee's question in 2001 regarding decentralization, the Civil Division stated that it assigned immigration cases to the U.S. Attorneys Offices because certain districts with large populations of aliens had acquired specialized immigration attorneys.

   A) Now that the Office of Immigration Litigation accounts for the largest budget increase request given the large number of 9/11-derivative immigration cases, how will the Civil Division allocate its resources?

   B) Will the Division coordinate and work with the U.S. Attorney offices in the field? If so, will more or less of these cases be assigned to the U.S. Attorneys' offices than prior to 9/11? Will Assistant U.S. Attorneys receive more training in litigating immigration cases? Is there a backlog of cases currently? How will the Civil Division decide to decentralize where it is prudent and avoid duplicative efforts with regard to immigration litigation?

2) **Settlements:** In 2001, the Civil Division adhered to the Code of Federal Regulations with regard to the terms under which authority to settle civil matters may be exercised or delegated within the Department of Justice. Those regulations stated that the Assistant Attorney General may delegate to the United States Attorney the authority to accept an offer in compromise of the government's claim only when: (1) the gross amount of the

government's claim does not exceed $5 million; and (2) the difference between the gross amount of the claim and the proposed settlement amount does not exceed $1 million. (28 C.F.R. §§ 0.160 - 0.171).

A) Have there been any changes to the regulations governing the Civil Division's authority to settle civil cases or to the policy of the Civil Division regarding settlements since 2001?

B) What is the percentage of cases litigated by the Civil Division that results in settlements? How does this compare to, for example, the last five years?

3) **Radiation Exposure Compensation System:** Following the Subcommittee hearing in 2001, the Civil Division explained in a supplemental response that the increased number of claims under the "Radiation Exposure Compensation Act" (RECA) resulted in an exhaustion of the Trust Fund to pay those claims, and that a supplemental appropriation in July 2001 was necessary to solve the funding problem. You state in your testimony today that the Division will monitor the adequacy of the caps established by the National Defense Act to ensure sufficient funds continue to be available for claimants.

Aside from monitoring, what specific methods are being employed to ensure that the Trust Fund is not exhausted? What benchmarks is the Division using as danger signals that would indicate the need for additional measures short of a supplemental appropriation?

4) **Radiation Exposure Compensation System:** Despite a steady decrease in the number of RECA claims filed since 2001, the Civil Division still receives a high number of claims, nearly 3,500 in 2002.

A) How has the Civil Division handled this caseload? Is there a backlog and, if so, what is its magnitude?

B) Further, why does the budget request not include an increase in the number of authorized attorney positions in the Radiation Exposure Compensation Program when there is an additional $1 million requested for administrative expenses associated with the program? What does this additional expense entail? Will the increase improve the process for dispensing these claims?

5) **Decentralization:** Following the Subcommittee's 2001 authorization hearing, the Subcommittee questioned the Civil Division on how best to maximize Justice Department resources. In particular, the query was whether Assistant U.S. Attorneys should be transferred from Main Justice to U.S. Attorney offices in the field. The Civil Division responded that it "has and will continue to explore opportunities for decentralization."

What efforts has the Civil Division made to explore areas for potential decentralization since 2001? Has further decentralization occurred, and if so, please describe this process and the results achieved.

6) **National Vaccine Injury Compensation Program:** There has been activity by Congress towards the creation of a smallpox compensation program. Last week, the Senate Committee on Health, Education, Labor and Pensions reported favorably a bill to compensate health workers injured by the smallpox vaccine.

A) Describe the liability of the United States and other parties if we do not enact legislation for injury suffered as a result of administering the smallpox vaccine.
B) What did the ill-fated swine flu immunization program of 1976 teach us about compensation programs?

C) How has the Civil Division's program mitigated the number of cases brought under tort law for vaccine-related injuries?

7) **Efficiencies:** The "Salaries and Expenses" breakdown on page 48 of the Budget Request for the Civil Division indicates a savings of $533,000 for "cross-cutting efficiencies."

What efficiencies were employed, and are they being utilized throughout the Division?

Questions for the Executive Office for United States Attorneys

1) A report issued by the General Accounting Office in January of this year, entitled "Better Management Oversight and Internal Controls Needed to Ensure Accuracy of Terrorism-Related Conviction Statistics", noted some substantial misclassification of cases originally reported as "terrorism-related" and concluded that "DOJ does not have sufficient management oversight and internal controls in place, as required by federal internal control standards, to ensure the accuracy and reliability of its terrorism-related conviction statistics". It went on to indicate that DOJ agreed to implement the report's recommendation for a formal system to oversee and validate the accuracy of case classification data entered in EOUSA's case tracking system. What steps have been taken to implement this recommendation?

2) While the January 2003 GAO report centered around the accuracy of terrorism-related cases, its recommendations are nonetheless relevant to EOUSA reports and classifications of all crimes. Are there standardized definitions and classifications followed by all U.S.

Attorneys in reporting case statistics to Main Justice? Moreover, since Department decisions concerning resource allocation are, at least to some extent, based upon case reporting statistics, what steps have been taken through past years to insure the accuracy of these statistics and have methods improved since the GAO report?

3) The Subcommittee has heard testimony earlier this Congress from the Executive Office for U.S. Trustees concerning efforts to attack bankruptcy fraud. While progress may have been made in that direction, what more can be done to encourage the Department of Justice and United States Attorneys to target and prioritize these offenses? While it is understandable that resources are limited, and terrorism is an obvious national priority, can we afford to place a lesser emphasis on crimes that lead to economic losses which, to a considerable extent, motivated the House of Representatives to overwhelmingly adopt strong Bankruptcy reforms? Would increasing penalties help focus the attention of prosecutors? Can criminal provisions be modified so that serious bankruptcy fraud is punished at a level commensurate to its harm on society, perhaps by considering amendment to the Racketeering Influenced and Corrupt Organizations Act?

4) United States Attorneys play a key role in the development and success of Weed and Seed programs around the country. Has this program been successful and is it expanding to fit the desire and need of local communities?

5) Weed and Seed was never intended as a perpetual federal grant program. It was intended to inject federal law enforcement and social support resources into a willing and participating locality which would itself progressively assume responsibility for the program. Are Weed and Seed localities becoming involved to the extent that when federal resources are reduced these localities aggressively assume the burden of bettering their own neighborhoods? What has happened when federal resources are reduced?

6) There was considerable discussion during the 2001 authorization hearing before the Subcommittee, developed further by subsequent questions after the hearing, about the deleterious effect of the so-called McDade law. This law provides that Federal prosecutors are subject to State laws and rules and Federal court rules in each State where the prosecutor engages in his duties. Has the situation improved for Federal prosecutors? If not, can we expect the Department to seek modification of the statute?

7) With respect to the application of the McDade law, there was also considerable discussion of the Oregon case of *In Re Gatti* which concerned whether that state's Code of Professional Responsibility contained a Federal prosecutorial exception. Without one, it was indicated, Federal prosecutors would be prohibited from overseeing or authorizing undercover operations. How has that case ultimately been decided and what have been results of efforts by the Department to work with the Oregon Bar to amend its disciplinary rules?

8) Mc Dade was predicated upon the Congress' and public's concern that federal prosecutors perform their jobs ethically. One way among many that federal attorneys' behavior comes to be scrutinized is criticism by federal judges. What is the specific number of cases that have arisen in this manner over each of the last 4 years? What vehicle exists for the public or private bar to complain of federal prosecutors' behavior? What investigative unit examined the merits of these cases and what prosecutive unit made decisions as to action to be taken? How many complaints were received in each of the last 4 years, how many have been resolved, and what dispositions have been made? What is the average time taken from the receipt of the complaint by whatever means and a final disposition?

9) It is important for morale in our United States Attorneys' offices that they be administered in a fair and expeditious manner. What vehicles are there for employees of United States Attorneys to seek redress for real or perceived mistreatment? Who administers such programs? How many complaints have been processed for each of the past 4 years? What dispositions have been made of those complaints? What is the average time taken from time of receipt to final disposition? What is the shortest time, and the longest, from receipt to resolution? How many cases have been filed against the Department of Justice by employees, whether in an administrative context, such as the EEOC, or the judicial system? Specifically for each of the last 4 years, what dispositions have been achieved? How much money has been paid to DoJ employees in United States Attorneys' offices due to either settlement or dispositions adverse to the Department in each of the last 4 years? How much was paid in attorneys' fees?

10) Defense of unjustified complaints against Assistant United States Attorneys is a necessary component of creating the proper balance of assertiveness and caution in their work. How and when does an Assistant United States Attorney receive government representation or compensation for private representation when complaints against them require a response? In each of the last 4 years, in how many specific cases were Assistant United States Attorneys represented in complaints challenging their behavior by government attorneys and in how many cases by private counsel? In those cases where there was private representation, who paid the fees? If the Assistant paid them, in how many cases were they later compensated by the Department?

11) When the actions of members of the United States Attorneys' offices are challenged, whether arising from the discharge of their administrative responsibilities or their prosecutorial responsibilities, does the Department represent them or is that the obligation of the individual whose behavior is challenged? Does there need to be any modification to existing law to rectify inequities or inefficiencies in this area?

Questions for the Executive Office for United States Trustees

1) The United States Trustee Program is divided into 21 regions, each of which is headed by a United States Trustee appointed by the Attorney General. The federal court system, on the other hand, is divided into just 12 circuits (not including the Federal Circuit). What are the costs and benefits that would result if the number of regional offices were consolidated into 12 regions?

2) The principal way in which the Program helps ensure the investigation and prosecution of criminal violations is by making referrals to the United States Attorneys.

   A) How many criminal referrals has the Program made for each of the last five years?

   B) What types of referrals were made during this period? Were any criminal referrals made in connection with 18 U.S.C. section 1519?

   C) How many of those referrals were prosecuted and what were the outcomes of those prosecutions?

   D) What does the Program do if the United States Attorney fails to pursue a referral?

   E) Are there any legislative "fixes" that Congress could consider that would make the prosecution of bankruptcy crimes more efficient and easier to prosecute?

3) In July of last year, the President issued an executive order creating the President's Corporate Fraud Task Force.

   What role, if any, does the Program play in connection with this Task Force?

4) As you know, the Department of Justice maintains an extensive training facility for all Department employees, including those of the Program, in Columbia, South Carolina. On the other hand, it appears that the Program, rather than utilizing these facilities, has on several occasions conducted training conferences in what might be described as relatively exotic locales, such as Santa Monica, California and Key West, Florida.

   A) Why does the Program not hold its Managers' Conferences at the Columbia, South Carolina facility?

   B) Please explain whether it is more cost-efficient to conduct conferences and training programs at private facilities rather than those available at the South Carolina training facility or at a federal facility located near an airport hub?

5) According to materials distributed by the Program at its Santa Monica Managers' Conference last November, total hours expended by Program employees on what is described as "707(b) activity" has more than tripled between the fourth quarter of FY 2000 and the fourth quarter of FY 2002.

   A) In light of the Program's limited financial and personnel resources, please explain whether this increase in time expended on section 707(b) matters has been to the detriment of criminal enforcement matters?

   B) By what amount, if any, did the time expended by the Program's employees on criminal enforcement matters increase during FY 2002?

6) In response to an inquiry, dated August 17, 2001, from my predecessor Congressman Bob Barr, with regard to the Program's efforts to reduce the prevalence of bankruptcy abuse, the Attorney General responded on November 14, 2001 that the Program "has long been at the forefront of attacking abuse in the bankruptcy system and taking vigorous action against the perpetrators both through civil and criminal proceedings." According to the recently released Justice Department's Office of Inspector General (OIG) audit report on the Program's efforts to prevent bankruptcy fraud and abuse, however, OIG found that the Program "has not established uniform internal controls to detect common, higher risk frauds such as a debtor's failure to disclose all assets" and that the Program's "mission to preserve the integrity of the bankruptcy system may not be accomplished as effectively as it should." Indeed, the February 27, 2003 response to the draft OIG report by Executive Office for United States Trustee appears to acknowledge these shortcomings and the need for "enhanced and comprehensive efforts to identify fraud and abuse in the bankruptcy system."

   A) In light of the OIG report's findings and recommendations, does the November 14, 2001 response still appear to be accurate?

   B) In its response to the draft OIG report, the Program, in several instances, appeared to explain that additional funding would better enable it to address certain findings and recommendations set forth in the report. Please elaborate and provide an estimate of the necessary funding. In addition to these matters, are there any other areas that require more funding than currently requested?

   C) Does the lack of investigative resources, primarily from the FBI, discussed on page 47 of the OIG report still exist? If so, what suggestions does the Program have to remedy this problem?

In addition, Mr. Goodlatte of Virginia submitted the following questions regarding the Trustee Program to be asked of Mr. Lawrence Friedman, Director of the Executive Office for United States Trustees:

1) Has the Executive Office for U.S. Trustees sought the input of the private trustees with respect to the utility of the various reports they must file for each bankruptcy case? On average, what percentage of time spent on a case do you estimate that Trustees spend filling out forms and paperwork?

2) In your statement to Congress on March 4, 2003 concerning the need for bankruptcy reform legislation, you stated that your offices are more carefully screening Chapter 7 bankruptcy cases. On page 4 of your statement, you stated that as a result of this enhanced scrutiny, you have "ferreted out a high number of cases which, under almost any court standard show substantial abuse by debtors..."

   As your office is requiring increased scrutiny of these Chapter 7 cases, would the Executive Office for U.S. Trustees support increasing the $60 per case fee that panel trustees are awarded in such cases in order to allow these trustees to devote more time on each case, perform important follow-up work, and thus be more vigilant in their scrutiny and administration of the cases? Why or why not?

3) Does the Executive Office believe that reducing the duration of time that Chapter 13 bankruptcies are reported on debtors' credit reports would encourage debtors to file Chapter 13 bankruptcies, rather than Chapter 7, and thus encourage more debtors to repay a larger portion of their debts? Would the Executive Office support such a measure?

Insofar as we are committed to concluding our authorization in a timely manner, you response is appreciated as soon as possible, but no later than May 9th, 2003 as it will greatly assist the Subcommittee in the consideration of legislation affecting the Department of Justice. Thanks you for your kind attention.

Sincerely,

Chris Cannon
Chairman
Subcommittee on Commercial and Administrative Law

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 12, 2003

The Honorable Chris Cannon
Chairman
Subcommittee on Commercial and
Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Attached are the responses to follow-up questions submitted on April 10, 2003 to Mr. Thomas Sansonetti, Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice, following the April 8, 2003 hearing on reauthorization of the Department of Justice. Please do not hesitate to contact this office if we may be of further assistance.

Sincerely,

Jamie E. Brown
Acting Assistant Attorney General

cc: The Honorable Melvin L. Watt
Ranking Member

Questions for the Environment and Natural Resources Division (ENRD):

1) **Regarding the case of Cobell v. Norton, could you please details as to how many staff and officials from both the Department of Justice (Environment and Natural Resources Division and Civil Division) and the Department of Interior have been charged with Contempt of Court or had sanctions placed upon them? In addition, could you provide a list of how many staff and officials have required private counsel in this matter? Finally, could you provide how much in fines or other penalties the personal sanctions which have been levied against staff and officials associated with the Cobell case cost in totality and individually?**

The plaintiffs have brought contempt charges against sixty present or former officials and employees of the Departments of the Interior, Justice, and Treasury -- many employees have more than one charge pending, some have as many as four. The district court has sanctioned eight Justice Department lawyers and found two Cabinet members from the last Administration and one Cabinet member from this Administration in contempt. Seventy current and former staff and officials from the Justice Department, the Interior Department, and the Treasury Department have been authorized to retain private counsel at government expense in Cobell v. Norton, which is now being handled by the Civil Division of the Justice Department.

No awards have been made as a result of sanctions against government employees. The court stated that, as sanctions, it would order payment of plaintiffs' attorney fees and costs. It directed plaintiffs to submit a statement of their fees and costs, but plaintiffs have not yet done so and the court has not yet entered an award. However, the court has awarded a total of $1,277,618.82 in contempt and other sanctions against the government and plaintiffs have sought $3,234,341.04 as an award for the most recent finding of contempt; the court has not yet ruled on their claim.

2) **As reported on August 23, 2002 in The Arizona Republic, "Tommy DeJong thought he was a lucky man when a federal agency helped him build a wastewater system for his Buckeye Dairy Farm". Instead, Mr. DeJong suffered through years of prosecution and criminal charges brought forward by criminal investigators from the EPA and United States Attorney. Mr. DeJong had relied on plans which were part of the U.S. Department of Agriculture's Soil Conservation Project. In fact, DOA paid $15,000 towards the eventual $150,000 cost for the waste run-off system that was needed. Subsequently, the design was so flawed that it cost Mr. DeJong $600,000 to correct the errors in DOA's plan. EPA did not think this was enough, and sought a six year jail sentence to punish Mr. DeJong for his reliance upon DOA. The subsequent prosecution was not only found to be baseless (possibly in a large part based on potential perjured testimony from a government witness), but DeJong was able to successfully file for legal fee and cost reimbursement through the Hyde Amendment. The Hyde Amendment, as you know, allows courts to order payments for attorney fees and costs if a case is filed which was vexatious, frivolous, or in bad faith. Mr. DeJong was ruled in order, and was able to collect $205,000 in fees and costs. It was the first**

successful claim under the Hyde Amendment in Arizona's history.

A) What role did ENRD have in this matter?

The United States Attorney's Office for the District of Arizona indicted this case in 1996. ENRD did not have an active role in the case at that time. In 1998, after several continuances to permit the conclusion of a negotiated disposition, the United States Attorney's Office informed ENRD that it was no longer able to staff the case and asked ENRD to take over the case for trial. The evidence introduced in the government's case included the testimony of several witnesses, including one of the defendant's neighbors and certain employees of the defendant, who testified that on multiple occasions the defendant knowingly used a concealed by-pass pipe to discharge directly from his waste run-off system into an adjacent stream. Moreover, at the end of the government's case, the judge refused to grant the defendant's motion for judgment of acquittal and permitted the case to go to the jury, which rendered a verdict of acquittal. Following the district court's post-trial award of attorneys's fees and costs to the defendant, the ENRD and the Criminal Division carefully examined the entire record in the case. This review indicated that the case was well-founded in fact, that alleged "personal animus" played no role in the decision to prosecute this case, and that, in any event, none of the defendant's allegations affected the legal underpinnings of the case. It should also be noted that the defendant did not allege – nor did the district find – that any government witness had offered perjured testimony. Based on this review, DOJ determined that an appeal from the award of attorney's fees and costs was warranted.

B) Realizing that this prosecution occurred under a different administration, do you have any explanation as to why this matter was taking to such lengths in being prosecuted? What has been done since DeJong to insure that baseless prosecutions such as these are reviewed prior to filing and can help to avoid any more successful claims under the Hyde Amendment from being upheld against the United States?

Because this prosecution occurred during the previous Administration, I was not privy to the decision to proceed to trial in this case. However, I can assure the Subcommittee that our criminal cases undergo extensive review by supervisors and senior staff before they are indicted. Most ENRD cases are handled jointly with United States Attorney's Offices, which also have stringent review procedures in place. These measures ensure that decisions to prosecute a case criminally are not left to individual prosecutors and are fair and justified. I am satisfied that during my time in ENRD, only those cases which fully satisfy the Principles of Federal Prosecution are allowed to go forward to be plead, indicted or tried. The DeJong case is the only successful instance of a Hyde Amendment claim against the Division.

3) Our National Parks are places of great beauty, national pride, and recreation. Unfortunately, lately they have also been a place of increased criminality. Public lands, especially those which share a national border, have shown evidence of poaching of animals and timber, areas of access for illegal immigrants, are potential

avenues for terrorist activity and perpetrators, and are used by manufacturers and traffickers of drugs. What resources within your Division are used for the purpose of prosecution of these criminal activities on Public Lands? Do you believe that there are sufficient amounts of law enforcement in these areas, or is more necessary?

The Division has devoted significant efforts to training rangers, land managers, and other personnel directly involved in protecting our national parks and other public lands on a variety of law enforcement issues. For example, it has hosted or co-sponsored workshops with other public agencies across the nation on both poaching and use of public lands by illegal drug manufacturers for methamphetamine labs. In these workshops, ENRD has experienced attorneys help explain what to look for and how to investigate these crimes, as well explaining the legal tools available to respond to these crimes, and provide a variety of training materials. The Division repeatedly encourages public land managers to bring such cases to its attention, and have brought and are continuing to bring poaching cases, if they are not already being handled by the United States Attorneys, and state and local law enforcement agencies. However, it has not brought any cases for environmental crimes in connection with methamphetamine labs on public lands, but this is because these cases are generally better handled under the drug laws. The Division believes that enforcement in these areas would be more effective if more law enforcement personnel were available to detect, investigate, and refer such matters for prosecution.

4) **How would you describe the differences in your Division's approach to Property Rights and Takings under the Bush Administration? In what ways has it changed since the Clinton Administration, and if it has not, why?**

This Administration recognizes the importance of ensuring that private property not be taken for public use without just compensation, as required by the Fifth Amendment of our Constitution. We encourage our client agencies to consider whether their actions will have takings implications. However, certain federal actions may subsequently result in unanticipated takings, and still other actions must be carried out pursuant to law even though they may incur potential takings liability. Accordingly, when such cases arise, we first assess whether there is merit to the claim and, if there is, seek to find a means of resolving the dispute in as expeditious and fair a manner as possible. Since I was not present in the Division during the previous Administration, I cannot speak to how its approach may have differed from that of this Administration.

5) **I find it hard to believe that the Environment Division did not receive any budget increases during the Clinton Administration. Can you explain what you mean when you say that FY04 would be the 1st year of "real" budget increases for the Division in a decade?**

To the extent that ENRD has received any budget increases in the last nine fiscal years, those increases have only been in response to higher mandatory costs, such as pay raises, and even then, the increases have generally not covered the full amount of those mandatory adjustments. For example, in fiscal years 1996 and 1997, the Division's budget was held virtually flat, while it had to absorb a total of

$6 million in higher mandatory costs. As a result, the Division has had its authorized positions cut from 699 in fiscal year 1995 to 607 in fiscal year 2003. Accordingly, the money requested for the Hazardous Materials Transportation and Tribal Trust Litigation Initiatives in fiscal year 2004 would represent the first real increase in ENRD's budget in the last ten fiscal years.

6) What is the role of the Department of Transportation in the hazardous materials transportation initiative?

The Department of Transportation (DOT) has an essential role in implementing the hazardous materials transportation initiative. DOT is responsible for providing adequate protection against the risk of life and property inherent in the transportation of hazardous materials in commerce. The Secretary of Transportation, through its Research and Special Programs Administration (RSPA), prescribes the regulations for the safe transportation of hazardous materials in intrastate, interstate and foreign commerce. Oversight and civil enforcement of these regulations are delegated to various DOT modal administrations, such as RSPA, the Federal Aviation Administration (FAA), the Federal Railroad Administration (FRA), and the Federal Motor Carrier Safety Administration (FMCSA). The DOT Office of Inspector General (OIG) investigates potential criminal violations of the hazardous materials regulations. OIG criminal investigations derive from referrals from the modal administrations or on its own initiative. ENRD is working closely with the OIG and the modal administrations to coordinate and promote this nationwide hazardous materials transportation initiative. Since DOT has the legal, technical, and investigative expertise in this area, its overall support and active involvement are key to this initiative.

7) I understand that 60% of the Environment Division's cases are defensive and therefore nondiscretionary. Are there sufficient resources for both civil and criminal enforcement efforts within the Division?

As I stated in my testimony, when ENRD's defensive and eminent domain litigation is considered together, in cases funded from the General Legal Activities (GLA) appropriation over 60 percent of our attorney time is spent on non-discretionary cases. The budget request submitted by the Administration to Congress provides sufficient resources for our civil and criminal enforcement efforts, which are discretionary. However, failure to fund the Division's budget at the full amount requested may hamper our efforts to implement the Hazardous Materials Transportation Initiative, which will help the Department achieve its top strategic goal of protecting America against the threat of terrorism by helping to prevent, disrupt, and defeat terrorist operations before they occur, and by vigorously prosecuting those who have committed, or intend to commit terrorist attacks in the United States. Also, failure to fund the Tribal Trust Fund Litigation Initiative will threaten the Division's ability to maintain adequate staffing and resource levels for its enforcement caseload.

8) In the last Congress you testified before this subcommittee on the so-called Rails-to-Trails cases. What has changed in the intervening year?

On June 20, 2002, I testified before the Subcommittee at a hearing on "Litigation and its Effect

on the Rails-to-Trails Program." There have been several positive developments since that time.

The Division has redoubled its efforts at resolving these cases through settlement, and successfully concluded *Town of Grantwood Village v. United States*, a Court of Federal Claims action involving property in Missouri, settling the principal and interest claims for $30,530. The court subsequently awarded $ 292,483 in fees and costs, which was substantially less than the $520,109 demanded. It has also resolved principal and interest claims in *Swisher v. United States* for $10,000, and in *Glosemeyer v. United States* for $200,000 (including costs). Plaintiffs' claim for fees and costs is still pending in *Swisher* and resolution of plaintiffs' attorneys fees demand in *Glosemeyer v. United States* has been held up at the request of plaintiff's counsel pending an inquiry to the IRS regarding tax implications of any fees award. ENRD also decided against filing an appeal in *Preseault v. United States*, bringing to a close the oldest of its rails-to-trails cases.

The Division has also sought to streamline the litigation process, saving the parties considerable time and money. For example, in the *Moore* and *Illig* cases which were referred to in the June 20 hearing, ENRD undertook an innovative valuation process which involved the appraisal and adjudication of a small fraction of "test case properties" as the basis for negotiating a settlement of the remaining claims in the case. Efforts are presently underway to settle both cases.

Finally, the Division has continued to explore ways to reduce the amount of litigation. We are working with the Department of Transportation to develop legislation which would provide an incentive for states to ensure that local trail operators acquire the appropriate property interests necessary for operation of a recreational trail.

U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

June 18, 2003

The Honorable Chris Cannon
Chairman
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This responds to your letter of April 10, 2003, posing questions to the Department of Justice arising out of the appearance of Deputy Assistant Attorney General Stuart Schiffer before the Subcommittee on April 8, 2003. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter. Please do not hesitate to call upon us if we may be of additional assistance.

Sincerely,

William E. Moschella
Assistant Attorney General

APRIL 10, 2003 QUESTIONS
FROM CHRIS CANNON, CHAIRMAN
SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW
HOUSE JUDICIARY COMMITTEE

QUESTIONS FOR THE CIVIL DIVISION

1. **Office of Immigration Litigation/Decentralization:** In response to the Subcommittee's question in 2001 regarding decentralization, the Civil Division stated that it assigned immigration cases to the U.S. Attorneys Offices because certain districts with large populations of aliens had acquired specialized immigration attorneys.

   A) Now that the Office of Immigration Litigation accounts for the largest budget increase request given the large number of 9/11-derivative immigration cases, how will the Civil Division allocate its resources?

   Answer:

   Under the budget authority provided in the FY 2003 Omnibus Appropriation, the Civil Division may spend up to $20 million for the Office of Immigration Litigation and use 132 workyears. As of April 21, there were 135 staff assigned to the office, including 100 attorneys. The Civil Division will fully use all FY 2003 budget authority and workyears available.

   B) Will the Division coordinate and work with the U.S. Attorney offices in the field?

   Answer:

   Petitions seeking direct review of immigration decisions in federal appellate courts comprise a majority of immigration cases filed nationwide and are handled primarily by the Department's Office of Immigration Litigation in accordance with its mandate to provide national oversight over immigration matters. The Office of Immigration Litigation also oversees all other immigration litigation and coordinates the government's responses by reviewing each case filed in federal court and assessing the level of Department involvement required by the case. Cases retained by the Office of Immigration Litigation for primary or shared litigation responsibility are ordinarily those that present complex immigration issues which may require nationwide coordination and substantial resources. Thus, the Department sends to the U.S. Attorney's offices what can be handled in those offices effectively and retains the substantial number of cases that require the Department's direction. Even in delegated cases, however, Department attorneys are assigned to provide assistance to the assigned Assistant U.S. Attorney, and the direction provided in such cases often is

substantial. Moreover, the Office of Immigration Litigation will provide additional assistance in delegated cases if requested by the U.S. Attorney's office. Such requests are frequent.

If so, will more or less of these cases be assigned to the U.S. Attorneys' offices than prior to 9/11?

Answer:

The number of immigration trial and appellate cases handled by the Department has increased sharply. The main reasons for this substantial increase are: 1) stepped-up immigration enforcement activity; (2) the Department's decision to streamline the process for adjudicating administrative challenges to immigration enforcement decisions; and 3) more frequent challenges in immigration matters filed in federal courts nationwide by aliens and their legal representatives. These factors have resulted in far more removal orders and other administrative decisions being subjected to judicial scrutiny, such as by the review petitions filed directly in the appellate courts and habeas corpus petitions filed in district courts. Between FY 2001 and FY 2002, the total number of new cases increased from 5,421 to 7,539. During that time, the number of cases assigned to U.S. Attorneys rose from 2,785 in FY 2001 to 2,936 in FY 2002, the year immediately following the September 11 attacks. We anticipate that the number of cases assigned to the U.S. Attorneys' offices will continue to increase along with the cases retained by the Department, commensurate with the continued sharp rise in challenges to exclusion, deportation, detention, and removal orders. The Department's future role, especially that of the Office of Immigration Litigation, will be more important than ever, both with respect to the number of cases for which it retains primary litigation responsibility, and in order to meet the ever-increasing and necessary demand for national coordination in immigration matters.

Will Assistant U.S. Attorneys receive more training in litigating immigration cases?

Answer:

Training is a priority for the Department's Office of Immigration Litigation, and will continue to be in the future. The office already conducts an annual, week-long training program in Washington, D.C., that is open to all government attorneys. There is also a training program conducted each spring at a different location throughout the United States each year. That program focuses on immigration litigation matters of especial importance, such as counter-terrorism (2002) and Homeland Security and reorganization (2003). More than 230 participants have attended each of the past two training programs, with heavy representation from U.S. Attorneys' offices. A new initiative for the Office of Immigration Litigation is to conduct "on demand" training involving one-day training sessions conducted by small teams of the office's attorneys on site at the requesting U.S. Attorney's office. Such training is specifically tailored to the individual litigation demands of the requesting office. Finally, the Office of Immigration Litigation also maintains an operational, secure web site that provides

invaluable litigation resources to government attorneys nationwide.

Is there a backlog of cases currently?

Answer:

Immigration litigation is primarily defensive in nature, so there is no "backlog"of cases such as, for example, cases awaiting prosecution. The ever-increasing numbers of defensive matters, however, means that motions for extensions of time to file the government's responses are becoming increasingly routine.

How will the Civil Division decide to decentralize where it is prudent and avoid duplicative efforts with regard to immigration litigation?

Answer:

Delegation decisions in immigration matters take into account the level of experience and expertise of particular U.S. Attorney's offices, and offices with more experience and expertise in immigration matters often have handled a greater percentage of their own trial matters than less-experienced offices. The Department's Office of Immigration Litigation works closely with those offices to ensure consistency in the government's responses and litigating positions. Such cooperation ensures that the resources of both offices are utilized with maximum efficiency.

2. **Settlements:** In 2001, the Civil Division adhered to the Code of Federal Regulations with regard to the terms under which authority to settle civil matters may be exercised or delegated within the Department of Justice. Those regulations stated that the Assistant Attorney General may delegate to the United States Attorney the authority to accept an offer in compromise of the government's claim only when: (1) the gross amount of the government's claim does not exceed $5 million; and (2) the difference between the gross amount of the claim and the proposed settlement amount does not exceed $1 million. (28 C.F.R. §§ 0.160 - 0.171).

A) Have there been any changes to the regulations governing the Civil Division's authority to settle civil cases or to the policy of the Civil Division regarding settlements since 2001?

Answer:

In accordance with 28 C.F.R. 0.168,[1] and with approval of the Acting Associate Attorney

[1] 28 C.F.R. provides in pertinent part:

§ 0.168 Redelegation by Assistant Attorneys General.

General, on February 3, 2003, the Assistant Attorney General for the Civil Division delegated to Civil Division branch, office and staff directors and attorneys-in-charge of field offices, subject to the limitations contained or referenced in Civil Division Directive 14-95, the following authority:

1. The authority to accept offers in compromise of claims on behalf of the United States in all cases in which the gross amount of the original claim did not exceed $5,000,000, so long as the difference between the gross amount of the original claim and the proposed settlement does not exceed $1,000,000; and

2. The authority to accept offers in compromise of, or settle administratively, claims against the United States in all cases where the principal amount of the proposed settlement does not exceed $1,000,000.

In each instance the $1,000,000 figure replaced the 11-year-old $500,000 cap in Section 1(b)(1) of Civil Division Directive 14-95. This increase in the delegation serves to harmonize the settlement authority of the United States Attorneys' offices, which already have settlement authority of $1,000,000, and the litigating branches of the Civil Division. The delegation was formulated in consultation with Civil Chiefs Working Group and representatives of the Executive Office for United States Attorneys. This delegation relates only to cases involving money, and then only where there are no disagreements among the interested components, and where no significant policy issues are presented. See, Directive 14-95, Section 1(c).

Since 2001, the Assistant Attorney General for the Civil Division has not increased the delegation of authority given to the United States Attorneys to accept an offer in compromise of the government's claim from the current $1,000,000 level.

B) What is the percentage of cases litigated by the Civil Division that results in settlements? How does this compare to, for example, the last five years?

(a) Assistant Attorneys General are authorized, with respect to matters assigned to their respective divisions, to redelegate to subordinate division officials and United States Attorneys any of the authority delegated by §§ 0.160 (a) and (b), 0.162, 0.164, and 0.172(b), except that any disagreement between a United States Attorney or other Department attorney and a client agency over a proposed settlement that cannot be resolved below the Assistant Attorney General level must be presented to the Assistant Attorney General for resolution.

(b) Redelegations of authority under this section shall be in writing and shall be approved by the Deputy Attorney General or the Associate Attorney General, as appropriate, before taking effect.

(c) Existing delegations and redelegations of authority to subordinate division officials and United States Attorneys to compromise or close civil claims shall continue in effect until modified or revoked by the respective Assistant Attorneys General.

Answer:

Overall, approximately 30 percent of Civil Division cases are resolved through settlement. By contrast, most of the Civil Division's cases, roughly 55 percent, are resolved as a result of voluntary dismissals or court rulings prior to trials such as dismissals, and summary judgments. Only some 15 percent are actually resolved as a result of judgments following trials.

	FY 1998	FY 1999	FY 2000	FY 2001	FY 2002
Percent Resolved Thru Settlement	30.4	24.6	33.1	27.2	32.2

3. **Radiation Exposure Compensation System (Trust Fund):** Following the Subcommittee hearing in 2001, the Civil Division explained in a supplemental response that the increased number of claims under the "Radiation Exposure Compensation Act" (RECA) resulted in an exhaustion of the Trust Fund to pay those claims, and that a supplemental appropriation in July 2001 was necessary to solve the funding problem. You state in your testimony today that the Division will monitor the adequacy of the caps established by the National Defense Act to ensure sufficient funds continue to be available for claimants.

A) Aside from monitoring, what specific methods are being employed to ensure that the Trust Fund is not exhausted?

Answer:

For any given fiscal year, the Civil Division receives spending authority for the RECA Trust Fund in quarterly lump sums, or, apportionments. Internal controls are in place that ensure that financial obligations do not exceed apportionments. Managers review monthly and ad hoc reports that show the number and value of claims approved, and the amounts obligated and paid. Program activity is generally kept in line with quarterly apportionments, with the goal that the annual cap will not be exhausted prematurely.

Over the life of the Program, multi-year projections are developed to help determine whether annual amounts available to the Trust Fund are sufficient to pay expected approvals. Following enactment of the RECA 2000 amendments, the Civil Division basically adopted the multi-year estimates prepared by the Congressional Budget Office. These estimates were necessarily rough, as there was a great deal of uncertainty regarding the possible impacts of the amendments.

B) What benchmarks is the Division using as danger signals that would indicate the need

for additional measures short of a supplemental appropriation?

Answer:

The key benchmarks that we watch are the number and value of claims approved and the level of obligations and payments made. Second, we track the numbers and types of claims received and approval rates, as these factors influence the value of claims that are likely to be approved. Finally, we track the rate at which claims are processed. This rate is influenced by a number of factors including staff and support resource levels, complexity of claims, and the extent to which the claims are well-documented and complete.

4. **Radiation Exposure Compensation System (Administration):** Despite a steady decrease in the number of RECA claims filed since 2001, the Civil Division still receives a high number of claims, nearly 3,500 in 2002.

A) How has the Civil Division handled this caseload? Is there a backlog and, if so, what is its magnitude?

Answer:

Currently, 19 employees are assigned to the RECA Program, including 5 attorneys, 11 paralegals/claims examiners, and 3 support staff. Each examiner is responsible for over 250 claims, on average.

Given this overwhelming workload per examiner, it is not surprising that our most recent statistics indicate the growth of a backlog. For fiscal year 2003, the numbers of claims received has exceeded the number of claims the staff is able to resolve. Specifically, through March, 1,716 claims have been received and 1,618 claims have been resolved. Accordingly, the number of claims pending at the end of each month has increased 12 percent during the last four months alone – from 2,490 to 2,779 pending claims.

B) Further, why does the budget request not include an increase in the number of authorized attorney positions in the Radiation Exposure Compensation Program when there is an additional $1 million requested for administrative expenses associated with the program? What does this additional expense entail? Will the increase improve the process for dispensing these claims?

Answer:

The vast majority of work on the claims is performed by the examiners, who are qualified to review the information provided by the claimants against the requirements set by the law. Each attorney is responsible for the overall management and handling of particular classes of claims. In this capacity, they review decisions, make adjudication recommendations, and

monitor workloads and processing times.

With literally hundreds of claims coming through the door, a great deal of work consists of reviewing incoming packages for completeness, talking with claimants, maintaining files, entering data into data bases, searching data bases, preparing award letters and payment letters, and tracking the workflow. The Civil Division seeks to relieve its attorneys and examiners of administrative tasks that, absent support resources, divert scarce resources away from the core work - adjudicating claims.

Should Congress approve the $1,000,000 program increase, the Division will assemble a team of 14 contractors who will handle all the administrative tasks described above, vastly increasing the efficiency with which claims are reviewed and resolved. This support is critical to the Program's ability to reduce the growing backlog.

5. **Decentralization:** Following the Subcommittee's 2001 authorization hearing, the Subcommittee questioned the Civil Division on how best to maximize Justice Department resources. In particular, the query was whether Assistant U.S. Attorneys should be transferred from Main Justice to U.S. Attorney offices in the field. The Civil Division responded that it "has and will continue to explore opportunities for decentralization."

A) What efforts has the Civil Division made to explore areas for potential decentralization since 2001?

Answer:

The Civil Division is participating with the Department's other legal divisions and the U.S. Attorneys in a study by the Justice Management Division's Management and Planning Staff (MPS) to review the allocation of attorneys and cases. We have provided MPS with extensive data on case and staffing trends. We have participated in preliminary discussions with the MPS staff to discuss areas for potential decentralization. The analysis is ongoing.

B) Has further decentralization occurred, and if so, please describe this process and the results achieved.

Answer:

Further decentralization has not occurred.

6. **National Vaccine Injury Compensation Program:** There has been activity by Congress towards the creation of a smallpox compensation program. Last week, the Senate Committee on Health, Education, Labor and Pensions reported favorably a bill to compensate health

workers injured by the smallpox vaccine.

A) Describe the liability of the United States and other parties if we do not enact legislation for injury suffered as a result of administering the smallpox vaccine.

Answer:

Smallpox vaccine is not covered under the Vaccine Injury Compensation Program. Thus, in the absence of new legislation, the liability of the United States for injuries suffered as a result of administering the smallpox vaccine is governed by 42 U.S.C § 233, as amended by section 304 of the Homeland Security Act ("section 304"). See Pub.L. 107-296, Title III, § 304(c); 116 Stat. 2165. Also, the President signed into law on April 30, 2003, the Smallpox Emergency Personnel Protection Act of 2003, which provides certain protections under specified circumstances to first responders if they are injured as a result of vaccination.

Section 304 is triggered when a smallpox countermeasure is administered pursuant to a declaration by the Secretary of Health and Human Services, such as the Declaration issued by Secretary Thompson on January 28, 2003. Injured individuals who fall within the category of individuals covered by the declaration, who are administered the vaccine by an authorized individual, and who are inoculated within the time period covered by the declaration may file claims. See 42 U.S.C. § 233(p)(2)(B). Individuals who were not inoculated, but who nonetheless contract vaccinia during the period of the Secretary's declaration or 30 days thereafter, or who reside or resided with an individual who was inoculated pursuant to the declaration, may also file claims. See 42 U.S.C. § 233(p)(2)(C).

Generally, under the terms of section 304, manufacturers and distributers of the smallpox vaccine; healthcare entities under whose auspices vaccine or another covered countermeasure is administered; health care professionals or other individuals authorized to administer the vaccine; and officials, agents, or employees of any of these entities or individuals are deemed to be employees of the Public Health Service for the purposes of liability "arising out of the administration of a covered countermeasure against smallpox." 42 U.S.C. §§ 233(p)(1), (7)(B). As employees of the Public Health Service, no claim for liability for injury or death attributable to the countermeasure could be brought against these entities or individuals. See 28 U.S.C. § 2679(b). Rather, such claims would be brought against the United States pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b), 2671, et seq. See 28 U.S.C. § 1346(b).

By its terms, the FTCA grants jurisdiction for actions on monetary claims for injury, property loss or death "caused by the negligent or wrongful act or omission of any employee of the Government," 28 U.S.C. § 1346(b), and does not permit suits seeking to hold the United States liable under strict or absolute liability theories. See Laird v. Nelms, 406 U.S. 797 (1972). In addition, the FTCA creates liability only for the acts or omissions of an employee "while [the employee is] acting within the scope of his office and employment." Scope of

employment is determined by state law principles because under the FTCA, the United States may only be held liable "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b).

In addition, the filing of an administrative claim with the relevant federal agency is a jurisdictional prerequisite to suit under the FTCA. See 28 U.S.C. § 2675(a). Such a claim must be filed within two years of the accrual of the claim and suit must be filed within six months of the denial of an administrative claim. See 28 U.S.C. §§ 2401(b), 2675. If the agency does not act on the claim within six months, the claimant may file suit without waiting for final action on the claim. 28 U.S.C. § 2675(a).

The FTCA also includes specific, enumerated exceptions to the United States' waiver of sovereign immunity. If an exception applies, the United States may not be sued. One such exception to suit is the discretionary function exception. See 28 U.S.C. § 2680(a). This exception precludes suit "based upon the exercise or performance [of] or the failure to exercise or perform a discretionary function or duty." For example, in the litigation following the implementation of the National Swine Influenza Vaccination program, the decisions to establish, suspend, and resume the vaccination program were all found to be protected by the discretionary function exception. See Stipulation and Final Pretrial Order, In Re Swine Flu Immunization Products Liability Litigation, MDL No. 330, Misc. No. 78-0040, p. 2 (D.D.C. Nov. 15, 1979).

Finally, if a plaintiff prevails, damages will be measured by the law of the place where the act or omission occurred and thus are generally covered by state law. The FTCA prohibits punitive damage awards, however. 28 U.S.C. § 2674. And, every federal court of appeals to address the issue has held that state-law statutory damages caps apply to the United States. See, e.g., Carter v. United States, 982 F.2d 1141, 1144 (7th Cir. 1992); Lozada v. United States, 974 F.2d 986, 987-89 (8th Cir. 1992); Owen v. United States, 935 F.2d 734, 737 (5th Cir. 1991), cert. denied, 502 U.S. 1031 (1992); Starns v. United States, 923 F.2d 34 (4th Cir.), cert. denied, 502 U.S. 809 (1991); Taylor v. United States, 821 F.2d 1428 (9th Cir. 1987), cert. denied, 485 U.S. 992 (1988); Lucas v. United States, 807 F.2d 414, 417 (5th Cir. 1986).

B)What did the ill-fated swine flu immunization program of 1976 teach us about compensation programs?

Answer:

The Swine Flu Program of 1976 was not a compensation program. Rather, the program relied on the tort liability system under an expanded version of the Federal Tort Claims Act. Under the program, the United States was liable for acts of participants in the Swine Flu

Program, including vaccine manufacturers and persons who administered the vaccine, under strict liability or negligence theories of liability. The enactment of the Swine Flu Program of 1976 enabled the vaccine to be manufactured in sufficient quantities and to be administered to over 40 million people throughout the country within a short period of time. Because the Swine Flu Program of 1976 was modeled on the tort liability system of the FTCA, it was not a compensation program and its relevance to compensation programs is by way of contrast.

The National Swine Flu Immunization Program of 1976, P.L. 94-380, 90 Stat. 1113 (1976) ("Swine Flu"), arose out of an attempt by the federal government to immunize the entire adult population of the United States against the perceived threat of a swine flu epidemic. From its commencement on October 1, 1976 until its suspension on December 16, 1976, over 42 million Americans were vaccinated in the largest immunization program in this country's history.[2] The swine flu legislation was enacted because insurers were not willing or able to provide insurance to swine flu vaccine manufacturers, and manufacturers were not willing or able to manufacture the vaccine absent insurance. The United States having decided that a mass immunization program against swine flu was a public health imperative, this legislation enabled that immunization program to take place.

The swine flu legislation contained specific provisions:

- It created a cause of action against the United States for any personal injury or wrongful death sustained as a result of the swine flu immunization resulting from the act or omission of a "program participant." The Act substituted the United States in place of manufacturers and those who administered the Swine Flu vaccine (i.e., "program participants") and permitted suit upon any theory of liability that would govern an action against such program participant under state law, including negligence, strict liability and breach of warranty. (Permitting strict liability suits was a departure from the FTCA, which does not permit the United States to be held liable without fault.)

- The Swine Flu Act made its cause of action the exclusive remedy and abolished suits against the vaccine manufacturers.

- It made the procedures of the FTCA applicable to suits brought under the Swine Flu Act.

- To be entitled to recover under the Swine Flu Act, a plaintiff had to establish by a preponderance of the evidence: 1) the nature of his illness; 2) a causal nexus with the

[2] Final Pretrial Order, *In Re Swine Flu Immunization Products Liability Litigation*, MDL Docket No. 330, Misc. No. 78-0040, All Cases, (United States District Court for the District of Columbia, November 15, 1979) Stipulation of Fact Not In Issue, No. 229.

Program, including vaccine manufacturers and persons who administered the vaccine, under strict liability or negligence theories of liability. The enactment of the Swine Flu Program of 1976 enabled the vaccine to be manufactured in sufficient quantities and to be administered to over 40 million people throughout the country within a short period of time. Because the Swine Flu Program of 1976 was modeled on the tort liability system of the FTCA, it was not a compensation program and its relevance to compensation programs is by way of contrast.

The National Swine Flu Immunization Program of 1976, P.L. 94-380, 90 Stat. 1113 (1976) ("Swine Flu"), arose out of an attempt by the federal government to immunize the entire adult population of the United States against the perceived threat of a swine flu epidemic. From its commencement on October 1, 1976 until its suspension on December 16, 1976, over 42 million Americans were vaccinated in the largest immunization program in this country's history.[2] The swine flu legislation was enacted because insurers were not willing or able to provide insurance to swine flu vaccine manufacturers, and manufacturers were not willing or able to manufacture the vaccine absent insurance. The United States having decided that a mass immunization program against swine flu was a public health imperative, this legislation enabled that immunization program to take place.

The swine flu legislation contained specific provisions:

- It created a cause of action against the United States for any personal injury or wrongful death sustained as a result of the swine flu immunization resulting from the act or omission of a "program participant." The Act substituted the United States in place of manufacturers and those who administered the Swine Flu vaccine (i.e., "program participants") and permitted suit upon any theory of liability that would govern an action against such program participant under state law, including negligence, strict liability and breach of warranty. (Permitting strict liability suits was a departure from the FTCA, which does not permit the United States to be held liable without fault.)

- The Swine Flu Act made its cause of action the exclusive remedy and abolished suits against the vaccine manufacturers.

- It made the procedures of the FTCA applicable to suits brought under the Swine Flu Act.

- To be entitled to recover under the Swine Flu Act, a plaintiff had to establish by a preponderance of the evidence: 1) the nature of his illness; 2) a causal nexus with the

[2] Final Pretrial Order, *In Re Swine Flu Immunization Products Liability Litigation*, MDL Docket No. 330, Misc. No. 78-0040, All Cases, (United States District Court for the District of Columbia, November 15, 1979) Stipulation of Fact Not In Issue, No. 229.

processing and compensating claims of vaccine-injured persons; second, the instability and uncertainty of the childhood vaccine market created by the risks of tort litigation. H.R. Rep. No. 99-908, 99th Cong., 2d Sess. 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6344, 6348. The Act prohibits the filing of a civil action for damages against a manufacturer, or one who administers the vaccine, for a "vaccine-related injury or death" unless the individual has first pursued a claim in the United States Court of Federal Claims under the VICP.

As of March 31, 2003, the total number of claims that have been filed since the VICP's inception is 8,237. Compensation totaling $1.425 billion has been awarded to 1,798 families. 3,854 claims have been denied, and 2,585 are pending.

A comparison of the number of children and families compensated under the Program with those who received settlements and judgments against vaccine companies prior to the Act's passage is illustrative. According to a 1986 House of Representatives Report on Childhood Immunizations, only 52 cases of the 299 filed against vaccine manufacturers between 1980 and 1985 resulted in settlement, for a total of $16.2 million as of March 1985.[4] Of the ten cases that went to trial by May 1985, only six resulted in verdicts for plaintiffs. Thus, the VICP has paid compensation totaling more than 80 times the settlement amount cited in the House Report, to more than 30 times the number of claimants.

Since the VICP's inception, only three families have rejected an award of compensation from the VICP in favor of pursuing a civil action. Other claimants who have not prevailed under the VICP may also pursue civil actions, although this Department does not have access to information regarding the number of private tort suits that have been filed against vaccine manufacturers and administrators in state or federal court.

Of note is a class of cases that have been filed on behalf of autistic children against vaccine manufacturers and manufacturers of thimerosal in state and federal courts alleging that autism and other neurologic disorders were caused by mercury poisoning from thimerosal-containing vaccines. Such suits are styled as individual and class actions and presently number approximately 200. To justify filings in state and federal court without seeking first compensation in the VICP, plaintiffs argue generally that thimerosal constitutes an "adulterant" or "contaminant" such that their injuries are not "vaccine-related" and thus fall outside the jurisdiction of the Court of Federal Claims, which has exclusive jurisdiction for vaccine injuries but not for injuries associated with contaminants in vaccines. The U.S. Court of Federal Claims held that the preservative thimerosal used in certain vaccines is *not* an adulterant or contaminant within the meaning of the Vaccine Act. Leroy v. Secretary, HHS (Nov. 22, 2002). Any injury arising from the thimerosal component of a covered vaccine therefore falls within the jurisdiction of the Court of Federal Claims under the VICP.

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[4]Staff of the Subcommittee on Health and the Environment, 99th Cong. 2d Sess., Childhood Immunizations 85-87 (Comm. Print 1986).

7. **Efficiencies:** The "Salaries and Expenses" breakdown on page 48 of the Budget Request for the Civil Division indicates a savings of $533,000 for "cross-cutting efficiencies." What efficiencies were employed, and are they being utilized throughout the Division?

Answer:

The Civil Division invests in productivity-enhancing tools to achieve efficiencies and maximize the effectiveness of limited staff resources. Examples of such investments include:

- The increasing use of specialized software by attorneys to assemble and manage evidentiary collections during discovery;
- The introduction of Blackberries - hand-held devices that give attorneys 24/7 access to email at home or on the road;
- The acquisition of scanner-copiers that can substantially speed the transmission and reproduction of large volumes of documents and forms;
- The expansion of web-based applications to facilitate on-line data entry and reports generation;
- Automating the competitive service recruitment and staffing function has reduced the time from closing date to delivery of a list of eligibles by approximately sixteen days, and improved records management; and
- Replacing selected subscriptions and reference books with electronic versions that are more convenient and less costly.

Eventually, significant savings may be realized by the development and implementation of a consolidated housing plan designed to reduce the number of Civil Division locations in Washington, DC from the current six to two or three. This change, when fully implemented, will yield economies of scale and eliminate duplication of basic services such as libraries, conference rooms, and copy centers.

U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 9, 2003

The Honorable Chris Cannon
Chairman
Subcommittee on Commercial and
Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Enclosed please find responses to questions you posed regarding the appearance before the Subcommittee of Mr. Guy A. Lewis, Director, Executive Office for United States Attorneys, on April 8, 2003.

Thank you for your attention to this matter. If we may be of additional assistance, we trust that you will not hesitate to call upon us.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

cc: The Honorable Melvin L. Watt
Ranking Minority Member

Questions and Answers for the House Oversight Committee:

Question 1: A report issued by the General Accounting Office in January of this year, entitled "Better Management Oversight and Internal Controls Needed to Ensure Accuracy of Terrorism-Related Conviction Statistics", noted some substantial misclassification of cases originally reported as "terrorism-related" and concluded that "DOJ does not have sufficient management oversight and internal controls in place, as required by federal internal control standards, to ensure the accuracy and reliability of its terrorism-related conviction statistics". It went on to indicate that DOJ agreed to implement the report's recommendation for a formal system to oversee and validate the accuracy of case classification data entered in EOUSA's case tracking system. What steps have been taken to implement this recommendation?

Answer: To alleviate any concern that the Department is wrongly classifying terrorism-related matters, we note that the General Accounting Office (GAO) acknowledges on page 13 of the report that 127 of the "misclassified" cases in fact fell under new anti-terrorism case categories. Only five of the 288 cases the GAO cited, or less than two percent, were unrelated to terrorism or our anti-terrorism efforts. Anti-terrorism cases are important even if they involve less serious charges as they can disrupt future terrorism activities. While some of these illegal acts may be for personal benefit we must guard against such activities as identity theft, and immigration violations being used to position individuals who may be committed to future acts of terrorism. So called "sleepers" are difficult to identify as they will seek to blend in with minimal illegal activity until they are activated.

Prior to 9/11, the Executive Office for United States Attorneys (EOUSA) had only two terrorism-related case classification codes -- International Terrorism and Domestic Terrorism. Reflecting the new reality after 9/11, EOUSA first added a case classification code for Terrorism-Related Hoaxes, then later added a code for Terrorist Financing and several codes for Anti-Terrorism (such as Identify Theft, Immigration, and Violent Crime) to capture activity intended to prevent or disrupt potential or actual terrorist threats where the offense conduct would not fall within one of the already-existing codes.

We are now using a broad range of prosecutions to disrupt activities that could facilitate or enable future terrorist acts. To ensure that data on all anti-terrorism cases are captured and included in our statistics, EOUSA, working with the Department's Criminal Division, on August 7, 2002, sent a memorandum to all United States Attorneys directing that appropriate pending cases and appropriate cases closed in Fiscal Year 2002 be reclassified, if needed, to reflect the new case classification codes. Under this directive, all Terrorism/Anti-Terrorism cases in Fiscal Year 2002 should have been re-sorted according to the new codes. With the transition to a new coding scheme so close to the end of the fiscal year, some United States Attorneys' offices either did not have time to, or did not fully understand the need to, reclassify already closed cases.

Accurate statistics are a high priority, and EOUSA will continue to take every reasonable step to ensure that proper reclassification is completed and that future data entries are complete and

accurate. EOUSA concurs with GAO's recommendation to oversee and validate the accuracy of case classification and conviction data entered into the case tracking system by the various United States Attorneys' offices. It is important to note, however, that a process does exist for the review of United States Attorney case management system data and that the "misclassifications" identified by GAO are the result of late notice to the United States Attorneys' offices of Terrorism and Anti-Terrorism code changes and insufficient time for offices to make the changes.

On April 9, 2003, EOUSA sent a directive to the United States Attorneys asking them to review all Terrorism and Anti-Terrorism matters and cases and ensure that the most appropriate Terrorism or Anti-Terrorism program category code is assigned. This directive re-emphasized the critical role of the United States Attorneys in providing the Department with accurate and timely caseload data. The United States Attorneys are required to inform EOUSA that they have completed this review process. Please be assured that EOUSA remains committed and will continue to work to ensure that the United States Attorneys' caseload data is as accurate as possible.

Question 2: While the January 2003 GAO report centered around the accuracy of terrorism-related cases, its recommendations are nonetheless relevant to EOUSA reports and classifications of all crimes. Are there standardized definitions and classifications followed by all U.S. Attorneys in reporting case statistics to Main Justice? Moreover, since Department decisions concerning resource allocation are, at least to some extent, based upon case reporting statistics, what steps have been taken through past years to insure the accuracy of these statistics and have methods improved since the GAO report?

Answer: The Executive Office for United States Attorneys (EOUSA) maintains the Legal Information Office Network System (LIONS) which is used by the United States Attorneys to track and report on criminal, civil, and appellate cases and case activities. The system is used to respond to numerous requests for statistical information and to produce management reports for use within the Department of Justice. The LIONS Manual, which is available to all United States Attorneys' office personnel, contains step-by-step instructions on using the system, a listing of all system codes, a data element dictionary, and coding policies. Guidance on newly established codes or policy is sent out via memorandum to the United States Attorneys upon implementation. In addition, EOUSA Case Management Staff personnel routinely assist district staff with inquiries about the LIONS system and reporting on their district's caseload.

In order to ensure the accuracy of their caseload statistics, the United States Attorneys perform a bi-annual criminal, civil, and appellate caseload review and certification process. This process was implemented in June 1996, and requires each district to review their LIONS system data and submit a certification to EOUSA in April and October of each Fiscal Year.

EOUSA has taken additional steps to increase data accuracy since the release of the GAO report in January 2003. On April 9, 2003, EOUSA issued a memorandum to all United States

Attorneys which implemented a formal terrorism case Data Quality Review to be completed by each United States Attorneys' office on a quarterly basis. This review calls for each office to review all pending and closed terrorism and anti-terrorism matters and cases to ensure the accuracy of the assigned program category code, and to ensure that the matter and case data are current. The United States Attorneys' offices are required to update their information in the case management system if necessary and notify EOUSA that they have completed their review by the deadline for each quarter.

Question 3: The Subcommittee has heard testimony earlier this Congress from the Executive Office for U.S. Trustees concerning efforts to attack bankruptcy fraud. While progress may have been made in that direction, what more can be done to encourage the Department of Justice and United States Attorneys to target and prioritize these offenses? While it is understandable that resources are limited, and terrorism is an obvious national priority, can we afford to place a lesser emphasis on crimes that lead to economic losses which, to a considerable extent, motivated the House of Representatives to overwhelmingly adopt strong Bankruptcy reforms? Would increasing penalties help focus the attention of prosecutors? Can criminal provisions be modified so that serious bankruptcy fraud is punished at a level commensurate to its harm on society, perhaps by considering amendment to the Racketeering Influenced and Corrupt Organizations Act?

Answer: The Department places great emphasis on the prosecution of bankruptcy fraud. Yet, it is important to distinguish the commission of bankruptcy crime from abuse of the bankruptcy system. In the current proposed legislation, Congress wisely provides for a means-test to prevent wealthy debtors from taking advantage of laws designed for the truly needy and limits dischargeability for credit card debts. Under both current law and the pending legislation, however, such debtors are not committing crimes. The Executive Office for U.S. Trustees, whose mandate is to provide oversight of the bankruptcy system, addresses the civil abuses which arise under current law and will continue to do so as gatekeeper under the new legislation. Using the civil remedies available to the Department prevents criminals from enjoying the benefits of the bankruptcy system without clogging the court system with criminal cases.

Bankruptcy fraud is often an extremely complex crime, requiring an understanding, not only of criminal law, but also of the Bankruptcy Code. A sophisticated criminal can make use of the automatic stay and discharge provisions of the Code either to hide assets gained from an earlier scheme or misuse the Code itself in a fraudulent manner. As a result, the investigation and prosecution of these crimes can require a significant amount of time and expenditure of resources. Additional investigative and prosecutorial personnel would result in an increased ability to handle bankruptcy fraud cases. Aggressive enforcement would revitalize a critical deterrent to bankruptcy crime and have the salutary effect of deterring the fraudulent and criminal activity that precedes some bankruptcy filings, as well.

As for considering amending the Racketeering Influenced and Corrupt Organizations (RICO) Act for use in bankruptcy fraud cases, the current RICO statute, 18 USC §1961(1)(D), defines

racketeering activity as including "any offense involving fraud connected with a case under title 11 (except a case under 157 of this title)." Section 157, the broadest of the bankruptcy fraud statutes, was specifically excluded from RICO. Including it as a racketeering activity would increase prosecutorial opportunities under RICO.

Question 4: United States Attorneys play a key role in the development and success of Weed and Seed programs around the country. Has this program been successful and is it expanding to fit the desire and need of local communities?

Answer: Weed and Seed programs have been successful. According to the National Institute of Justice's June 1999 *Research in Brief* publication entitled "National Evaluation of Weed and Seed," data has shown that violent crime and drug crime rates in Weed and Seed target areas typically declined more or increased less than crime in the rest of the city or county. In addition, funded sites file Government Performance and Results Act (GPRA) forms annually. These reports indicate that homicides have declined faster in Weed and Seed areas than jurisdiction-wide.

The Weed and Seed strategy has expanded in recent years to 315 sites due to the reduction in per-site funding. By providing less funding per site, more sites can be added. Official Recognition of a local Weed and Seed site by the Executive Office for Weed and Seed (EOWS) is designed to affirm the constructive efforts of the local community and to help a site in its efforts to leverage other resources. In Fiscal Year 2003, more than 100 Weed and Seed sites applied for Official Recognition. Of those applicants, approximately 30 sites received Official Recognition. Official Recognition lapses after five years. In order to maintain Official Recognition status, a Weed and Seed site must reapply, showing a sound Weed and Seed strategy, growth, and success in gaining local support and resources to sustain the Weed and Seed program over the long term.

Question 5: Weed and Seed was never intended as a perpetual federal grant program. It was intended to inject federal law enforcement and social support resources into a willing and participating locality which would itself progressively assume responsibility for the program. Are Weed and Seed localities becoming involved to the extent that when federal resources are reduced these localities aggressively assume the burden of bettering their own neighborhoods? What has happened when federal resources are reduced?

Answer: The Executive Office for Weed and Seed disseminates funding to local sites in support of their Weed and Seed strategies. These funds are limited, however, and cannot provide the entire amount of resources required to transform and revitalize a neighborhood experiencing high crime and social and economic decay. Therefore, the Weed and Seed strategy is an opportunity for a community to leverage the available resources-funding, strategic planning, and organizational structures-that enable communities to tap into additional resources from federal, state, and local agencies, foundations, corporations, and other funding organizations.

A Weed and Seed site is well placed to capitalize on a number of funding sources in both the

public and private sectors. In fact, Weed and Seed sites are expected to leverage all available resources in order to fully fund their strategies for law enforcement, crime prevention, and neighborhood revitalization. A number of sites have sustained Weed and Seed activities in their designated areas without Weed and Seed funding. The required annual Government Performance and Results Act (GPRA) reports indicate that in 2001, Weed and Seed sites leveraged 13 times the amount of their Weed and Seed grant funds and in 2002, 17 times the amount. The process of coordinating, planning, and implementing a Weed and Seed strategy has often proven to be beneficial in itself; and the working relationships which grow out of the coordination process in the long run can be worth much more than the grant funding which a site may eventually receive.

Question 6: There was considerable discussion during the 2001 authorization hearing before the Subcommittee, developed further by subsequent questions after the hearing, about the deleterious effect of the so-called McDade law. This law provides that Federal prosecutors are subject to State laws and rules and Federal court rules in each State where the prosecutor engages in his duties. Has the situation improved for Federal prosecutors? If not, can we expect the Department to seek modification of the statute?

Answer: Many United States Attorneys' Offices continue to informally report their frustration in investigating and prosecuting criminal cases as a result of the 1998 passage of 28 U.S.C. § 530B, which not only required prosecutors to abide by the professional ethics rules of the state where they carry out their prosecutorial duties, but also negated the Department's previous reliance on its own regulation concerning the permissible range of contacts with represented persons. This frustration seems to be more evident in the white collar and corporate fraud context in which AUSAs and investigators appear to be hampered from talking to corporate whistle blowers and other categories of corporate employees when, for example, the company retains counsel in the same or a similar matter. Though it is hard to quantify the extent to which USAOs continue to be impeded and hindered, suffice it to say, USAOs continue to report their frustration with 28 U.S.C. § 530B.

As for whether you can expect the Department to seek modification of the statute, recall that the Department sought a revision of § 530B in the wake of the terrorist attacks perpetrated on the United States on September 11, 2001. The Department expressed its substantial concerns that certain attorney conduct rules, as well as the choice-of-law uncertainty as to which state's rules should apply in certain national investigations, would frustrate and thwart legitimate law enforcement investigations into terrorist activities. One piece of proposed legislation – sponsored several times by Senator Leahy, and later by other Senators, including Senators Hatch and Wyden – seemed for a time to have some chance of success. The bill would have made some limited changes to § 530B; it would have clarified the choice-of-law problem when more than one state's rules are arguably applicable; it would have provided that AUSAs and Department attorneys need be members of only one state bar; it would have contained a *Gatti* fix; it would have directed the Judicial Conference to devise a rule on contacts with represented persons that would accommodate both government and private practice interests; and it would

have directed the Judicial Conference to review the rules of professional responsibility to determine whether any other rules unfairly hinder legitimate law enforcement functions. Even this modest proposal, however, ultimately failed. All of this is to say that the Department continues to seek a modification of § 530B and would ask for your support in accomplishing the same.

Question 7: With respect to the application of the McDade law, there was also considerable discussion of the Oregon case of *In Re Gatti* which concerned whether that state's Code of Professional Responsibility contained a Federal prosecutorial exception. Without one, it was indicated, Federal prosecutors would be prohibited from overseeing or authorizing undercover operations. How has that case ultimately been decided and what have been results of efforts by the Department to work with the Oregon Bar to amend its disciplinary rules?

Answer: In the case of *In re Gatti*, 8 P.3d (Or. 2000), the Oregon Supreme Court ruled that an attorney had violated Oregon Code of Professional Responsibility DR 1-102(A)(3) (conduct involving dishonesty, fraud, deceit or misrepresentation) and DR 7-102(A)(5) (knowingly making false statement of law or fact) and Oregon Revised Statutes 9.527(4) (willful deceit or misconduct in the legal profession) by misrepresenting himself for the alleged purpose of identifying fraudulent conduct. The court rejected arguments by federal and state prosecutors for a law enforcement exception to these provisions. The court did, however, invite the Oregon State Bar to consider amending its rules.

On January 19, 2001, the Oregon State Bar House of Delegates held a special session to consider a proposed amendment to its rules, in light of *Gatti*. The House of Delegates voted (103 to 47) to amend DR 1-102 to permit lawyers to advise and supervise others engaged in covert activity. The proposed language provided:

> (D) Notwithstanding subsections (A)(1) and (A)(3) of this rule or DR 7-102(A)(5), it is not misconduct for a lawyer to supervise or advise about lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise consistent with these disciplinary rules.

Before the amended disciplinary rule could become effective, the Oregon Supreme Court had to adopt the proposed amendment. On April 11, 2001, the Oregon Supreme Court rejected the proposed amendment. It stated that the draft rule was written too broadly.

Thereafter, the Department filed, in Oregon federal district court, a civil suit against the Oregon State Bar for declaratory and injunctive relief. The suit sought a declaration that the Supremacy Clause barred any application to federal attorneys of DR 1-102 and DR 7-102, as interpreted in *In re Gatti*, for activities relating to their official duties, and a permanent injunction precluding the

Oregon State Bar from enforcing DR 1-102 and DR 7-102 against federal attorneys admitted to practice in Oregon for activities relating to their official duties.

As part of a settlement agreement in the case, on December 11, 2001, the Oregon State Bar agreed to not institute or conduct proceedings against Department attorneys for ethical violations concerning conduct or activities that would have been in violation of DR 1-102 so long as the conduct or activities conformed to the requirements of an amended DR 1-102(D). Covered by this agreement was conduct or activities which occurred on or after December 11, 2001 through such time as the Oregon Supreme Court considered and voted on the proposed amendments to DR 1-102(D).

The newly amended version of Oregon Disciplinary Rule 1-102 was approved by the Oregon Supreme Court on January 29, 2002, and went into effect January 31, 2002. The rule change had been previously approved by the Oregon State Bar House of Delegates on January 18, 2002. The amended rule contains an added section which addresses the issue raised by the *In re Gatti* decision concerning lawyers who advise or supervise undercover operations.

Question 8: Mc Dade was predicated upon the Congress' and public's concern that federal prosecutors perform their jobs ethically. One way among many that federal attorneys' behavior comes to be scrutinized is criticism by federal judges. What is the specific number of cases that have arisen in this manner over each of the last 4 years? What vehicle exists for the public or private bar to complain of federal prosecutors' behavior? What investigative unit examined the merits of these cases and what prosecutive unit made decisions as to action to be taken? How many complaints were received in each of the last 4 years, how many have been resolved, and what dispositions have been made? What is the average time taken from the receipt of the complaint by whatever means and a final disposition?

Answer: The Office of Professional Responsibility (OPR) investigates allegations of misconduct involving Department attorneys, investigators, or law enforcement personnel, where the allegations relate to the exercise of the authority of an attorney to investigate, litigate, or provide legal advice. This includes matters initiated as a result of judicial criticism or, more rarely, a judicial finding of misconduct.

OPR receives and reviews allegations of misconduct by Department of Justice lawyers from many sources, including criminal defendants, civil litigants, and the bar.

OPR conducts a review of all allegations of violations of law, applicable rule of professional conduct, or Department regulation or policy by Department of Justice attorneys in the course of their duties, as set forth above. In the rare event that possible criminal conduct is involved, OPR's practice is to confer with the Public Integrity Section of the Criminal Division and to refer the matter to that section if warranted. In most cases, however, OPR itself conducts an inquiry or investigation to gather the necessary information. This may include reviewing transcripts and

pleadings, obtaining written responses, and questioning the attorney alleged to have engaged in misconduct and other witnesses, including the judge, where that is appropriate.

At the conclusion of an investigation, OPR issues a report of investigation that includes its findings and conclusions. If OPR finds professional misconduct, which includes both intentional misconduct and conduct in reckless disregard of a standard or obligation, it recommends a range of disciplinary action. The possible actions range from an admonishment or letter of reprimand up to suspension or removal. Supervisors of the attorney in question decide the appropriate action within the recommended range and initiate disciplinary action. State bar disciplinary authorities are advised of findings of professional misconduct once disciplinary action is final, except in unusual cases in which the conduct in question does not implicate a bar rule. In other cases, OPR may conclude, based on its investigation, that a Department attorney exercised poor judgment or made a mistake. These findings are addressed through management action. Finally, in a significant number of cases, OPR concludes that the Department attorney acted appropriately under the circumstances.

The following table shows the number of matters initiated by OPR in each of the last four fiscal years which involved judicial criticism or a judicial finding of professional misconduct by a Department of Justice attorney. The figures set forth in each of the following four tables include matters involving attorneys in the Department's litigating divisions as well as those in the United States Attorneys' offices.

Table I

INVESTIGATIONS AND INQUIRIES OPENED Based on Judicial Criticism or Findings			
	Investigations[1]	Inquiries[2]	Totals
Fiscal Year 1999	52	5[3]	57
Fiscal Year 2000	55	13	68
Fiscal Year 2001	42	21	63

[1] Matters involving judicial criticism or judicial findings of misconduct that were initially opened as inquiries and later converted to investigations are counted as investigations for purposes of table I.

[2] These matters were opened and closed as inquiries.

[3] OPR began capturing additional information regarding inquiries with the implementation of a new electronic database system on July 7, 1999. Prior to that date, OPR's database did not indicate whether an inquiry involved judicial criticism or a judicial finding of misconduct. Thus, this figure represents only inquiries opened between July 7 and September 30, 1999.

Fiscal Year 2002	42	35	77
Totals	191	74	265

Depending on the nature of the allegation, OPR initially designates a new matter as either an "inquiry" or an "investigation." In most cases, a new matter is opened as an inquiry and assigned to an OPR attorney who obtains a detailed written response to the allegations from the subject attorney and reviews relevant documents. If it is determined that the matter can be resolved based on that information and that further investigation is unlikely to lead to a finding of professional misconduct, the OPR attorney prepares a memorandum stating the facts and analysis and recommending closure. If the Deputy Counsel and the Counsel concur, the inquiry is closed. If, however, OPR determines that the matter may result in a finding that the subject attorney engaged in professional misconduct or if the facts cannot be determined without additional information, the matter is converted to an investigation. OPR then conducts an in-depth examination of the matter including interviews of witnesses and the subject attorney. Some new matters, such as those involving particularly serious allegations or allegations against high level Department of Justice officials, are designated as investigations upon opening. At the conclusion of an investigation, OPR sends a formal report of investigation to the Director of the Executive Office for United States Attorneys or the head of the Department of Justice component in which the subject attorney is employed, with a copy to the Office of the Deputy Attorney General.

You further requested information on the number of complaints received by OPR during the last four years, the number of those complaints that were resolved, and their dispositions. We interpreted this question to relate to all inquiries and investigations involving attorney subjects that were opened and closed by OPR during the years in question, whether or not they involved judicial criticism or a judicial finding of misconduct. Table 2, below, shows the total number of inquiries and investigations opened and closed during each of the last four fiscal years.

Table 2

OVERALL INVESTIGATIONS AND INQUIRIES OPENED AND CLOSED Involving DOJ Attorney Subjects						
	Investigations		**Inquiries**		**Totals**	
	Opened	Closed	Opened	Closed	Opened	Closed
Fiscal Year 1999	85	61	76	17[4]	161	78

[4] Inquiries were not assigned opening and closing dates in OPR's electronic database prior to implementation of the new electronic database system on July 7, 1999. Thus, the figures reported for fiscal year 1999 include only the 76 inquiries that were opened between July 7 and September 30, 1999, and the number of those matters (17) that were also closed within that time period. As reflected in Table 4, below, the average time between the opening and closing of an inquiry is five months.

Fiscal Year 2000	89	77	175	136	264	213
Fiscal Year 2001	77	81	142	190	219	271
Fiscal Year 2002	65	73	157	168	222	241
Totals	316	292	550	511	866	803

You also requested the dispositions of matters opened by OPR during the preceding four fiscal years. As discussed above, inquiries are closed by OPR if it appears, based upon the results of the initial inquiry, and that it is unlikely that further investigation would result in a finding of professional misconduct. Thus, all matters closed as inquiries represent a finding by OPR that no professional misconduct was found and that further investigation is unwarranted.

The following table shows the dispositions of the investigations closed in each of the four preceding years. It should be noted that OPR investigations often involve more than one attorney subject, and may involve more than one allegation against each attorney subject. For purposes of table 3, each closed investigation was assigned to a category based on the most serious finding contained in the investigative report. Thus, an investigation in which any of the subject attorneys was found to have engaged in professional misconduct would be reported in the "professional misconduct" column, irrespective of any other findings made against that attorney or others discussed in the report.

Table 3

DISPOSITIONS OF INVESTIGATIONS CLOSED Involving DOJ Attorney Subjects				
	Professional Misconduct Found	**Poor Judgment Found**	**No Professional Misconduct or Poor Judgment Found**	**Totals**
Fiscal Year 1999	11	9	41	61
Fiscal Year 2000	12	13	52	77
Fiscal Year 2001	20	11	50	81
Fiscal Year 2002	21	18	44	73
Totals	64	41	187	292

OPR finds professional misconduct when it concludes that an attorney intentionally or knowingly violated or acted in reckless disregard of an obligation or standard imposed by law, applicable rule of professional conduct, or Department regulation or policy.

OPR finds poor judgment when it concludes that a Department attorney, faced with alternative courses of action, chose a course of action that is in marked contrast to the action that the

Department may reasonably expect an attorney exercising good judgment to take. Poor judgment differs from professional misconduct in that a Department attorney may act inappropriately and thus exhibit poor judgment even though he may not have violated or acted in reckless disregard of a clear obligation or standard. In addition, an attorney may exhibit poor judgment even though an obligation or standard at issue is not sufficiently clear and unambiguous to support a professional misconduct finding. Poor judgment differs from a mistake in that the latter is the result of normal human error despite an attorney's choice of an appropriate course of action.

Investigations reported as resulting in no finding or professional misconduct or poor judgment include those in which all attorney subjects were found to have acted appropriately under the circumstances, as well as those in which one or more attorney subjects were found to have made a mistake, displayed a performance problem, or pursued a course of conduct which, while not the best course of action, was nevertheless found by OPR not to constitute a mistake or poor judgment under the circumstances.

Finally, you asked the average time elapsed from the receipt of a complaint by whatever means to final disposition. This figure is not automatically captured by OPR's database. Recently, however, OPR reviewed matters closed over the previous two and one-half fiscal years (October 1, 2000 through March 31, 2003), to determine the average number of months between the opening and closing of investigations and inquiries. The results of that review are set forth in table 4, below.

Table 4

INVESTIGATIONS AND INQUIRIES CLOSED 10/1/00 TO 3/31/03 Average Months to Close[5]		
	Investigations	Inquiries
Fiscal Year 2001	17	5
Fiscal Year 2002	21	5
Fiscal Year 2003, through 3/31/03	19	5
Average Months to Close	19	5

Question 9: It is important for morale in our United States Attorneys' offices that they be administered in a fair and expeditious manner. What vehicles are there for employees of

[5] OPR excluded from the calculations in table 4 a few matters which were extremely atypical, including one major investigation which required the assignment of four OPR attorneys and two FBI agents, and three investigations in which the major investigative activity did not occur between the assigned opening and closing dates, such as matters that were split off from other investigations shortly before the report of investigation was completed.

United States Attorneys to seek redress for real or perceived mistreatment? Who administers such programs? How many complaints have been processed for each of the past 4 years? What dispositions have been made of those complaints? What is the average time taken from time of receipt to final disposition? What is the shortest time, and the longest, from receipt to resolution? How many cases have been filed against the Department of Justice by employees, whether in an administrative context, such as the EEOC, or the judicial system? Specifically for each of the last 4 years, what dispositions have been achieved? How much money has been paid to DOJ employees in United States Attorneys' offices due to either settlement or dispositions adverse to the Department in each of the last 4 years? How much was paid in attorneys' fees?

Answer: Employees of the United States Attorneys Offices may seek redress for real or perceived grievances, or file complaints about the activities of USAO employees, through at least seven different mechanisms:

(1) Grievances:

USAO employees may file a grievance over any employment matter or action pursuant to DOJ Order 1200.1.

(2) Merit Systems Protection Board Appeals:

USAO employees may appeal certain agency actions to the MSPB, the successor to the Civil Service Commission. These actions include: Removal, Suspension of 14 days or more; Suitability, Reduction in grade, Reduction in pay (including a denial of a within-grade increase), and a Furlough of 30 days or less (see 5 U.S.C. 7521 and 5 C.F.R. 1201.137(a)).

The MSPB also has jurisdiction to hear certain whistleblowing claims made by federal employees. 5 C.F.R. 1209.1. Whistleblowing is defined as the disclosure of information by an employee, former employee, or applicant that the individual reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety

MSPB Appeals are appealable directly to the United States Court of Appeals for the Federal Circuit.

(3) Equal Employment Opportunity Complaints:

USAO employees may contact EOUSA's Equal Employment Opportunity Staff (EEOS) to assert a claim of discrimination or retaliation in employment pursuant to Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991. In certain situations, Final Agency Decisions on EEO complaints may be appealed to the Equal Employment Opportunity Commission and/or to United States District Court. See 42 U.S.C. 2000e, *et seq.*; 29 C.F.R.

1614.101, *et seq.*

A. How many EEO complaints have been processed for each of the past 4 years?

Requests For Counseling	Formal Complaints Filed	Cases Closed
FY1999 - 48	FY1999 - 50	FY1999 - 21
FY2000 - 35	FY2000 - 28	FY2000 - 33
FY2001 - 46	FY2001 - 23	FY2001 - 40
FY2002 - 71	FY2002 - 42	FY2002 - 78
Total - 200	Total - 143	Total - 172

B. What dispositions have been made to those complaints?

Between 1999 and 2002, EOUSA closed 172 cases. These cases were disposed of in the following manner:

1. Withdrawals 23
2. Settlement Agreements 49
3. Final Agency Decisions 100

C: What is the average time taken from time of receipt to final disposition?

Withdrawals, Settlements, Final Agency Decisions

FY1999 - 521.86 Average Days
FY2000 - 544.00 Average Days
FY2001 - 800.25 Average Days
FY2002 - 438.71 Average Days

D: What is the shortest time, and the longest, from receipt to resolution?

	Shortest Time	Longest Time
FY1999 -	90 Days	1560 Days
FY2000 -	240 Days	660 Days
FY2001 -	90 Days	870 Days
FY2002 -	30 Days	600 Days

E. How many cases have been filed against the Department of Justice by employees, whether in an administrative context, such as the EEOC, or the judicial system?

Total of **143** formal EEO complaints filed in the administrative process against EOUSA and the USAOs in the past 4 years.

F. Specifically for each of the last 4 years, what dispositions have been achieved?

FY1999 -	Withdrawals	9
	Settlement Agreements	4
	Final Agency Decisions	8
FY2000 -	Withdrawals	4
	Settlement Agreements	10
	Final Agency Decisions	19
FY2001 -	Withdrawals	4
	Settlement Agreements	7
	Final Agency Decisions	29
FY2002 -	Withdrawals	6
	Settlement Agreements	28
	Final Agency Decisions	44

G: How much money has been paid to DOJ employees in United States Attorneys' offices due to either settlement or dispositions adverse to the Department in each of the last 4 years?

FY1999 - $0
FY2000 - $102,750.00
FY2001 - $0
FY2002 - $211,750.00

H. How much was paid in attorneys' fees?

FY1999 - $12,000.00
FY2000 - $10,000.00
FY2001 - $0
FY2002 - $132,790.28

I.. Specifically for each of the last 4 years, what dispositions have been achieved?

FY1999 -	Finding Discrimination	0
	Finding No Discrimination	13

	Dismissal of Complaints	1
FY2000 -	Finding Discrimination	0
	Finding No Discrimination	13
	Dismissal of Complaints	5
FY2001 -	Finding Discrimination	0
	Finding No Discrimination	29
	Dismissal of Complaints	0
FY2002 -	Finding Discrimination	1
	Finding No Discrimination	26
	Dismissal of Complaints	14

(4) Office of Special Counsel (OSC) :

Before appealing to the MSPB on a whistleblowing claim, the appellant must first file a claim with the Office of Special Counsel. See 5 C.F.R. 1209.5.

(5) Uniformed Services:

Certain employees of the United States Attorneys' Offices may also have rights and remedies pursuant to the Uniformed Services Employment and Re-Employment Rights Act of 1994 (USERRA), as amended, and the Veterans Employment Opportunity Act (VEOA) before the MSPB. See 38 U.S.C. 4324 and 5 U.S.C.3330a, respectively, and 5 C.F.R. 1208.1, *et seq.*

(6) Office of Inspector General (OIG):

The OIG at the Department of Justice has responsibility for investigating allegations of waste, fraud and abuse by DOJ employees and in DOJ programs.

(7) Office of Professional Responsibility (OPR):

Employees may also file a complaint with OPR if the allegations pertain to wrongdoing by an attorney engaged in professional misconduct in connection with their duties, representing the government in litigation, or in providing legal advice. OPR also serves as the Department's contact with state bar disciplinary organizations. (Allegations may also be raised directly with an attorney's state bar disciplinary organization.). The objective of OPR is to ensure that Department of Justice attorneys continue to perform their duties in accordance with the high professional standards expected of the Nation's principal law enforcement agency.

Information about the complaints, other than EEO, is maintained by the General Counsel's Office (GCO) of EOUSA. The GCO will need additional time to respond to the

following questions about the non-EEO complaints:

How many complaints have been processed for each of the past 4 years?

What dispositions have been made of those complaints?

What is the average time taken from time of receipt to final disposition?

What is the shortest time, and the longest, from receipt to resolution?

How many cases have been filed against the Department of Justice by employees, whether in an administrative context, such as the EEOC, or the judicial system?

Specifically for each of the last 4 years, what dispositions have been achieved?

How much money has been paid to DoJ employees in United States Attorneys' offices due to either settlement or dispositions adverse to the Department in each of the last 4 years?

How much was paid in attorneys' fees?

Question 10: Defense of unjustified complaints against Assistant United States Attorneys is a necessary component of creating the proper balance of assertiveness and caution in their work. How and when does an Assistant United States Attorney receive government representation or compensation for private representation when complaints against them require a response? In each of the last 4 years, in how many specific cases were Assistant United States Attorneys represented in complaints challenging their behavior by government attorneys and in how many cases by private counsel? In those cases where there was private representation, who paid the fees? If the Assistant paid them, in how many cases were they later compensated by the Department?

Answer: Federal employees may be provided representation in civil, criminal and Congressional proceedings in which they are sued, subpoenaed or charged in their individual capacity, or reported to a disciplinary committee. Requests for representation are granted by the Department of Justice pursuant to 28 C.F.R 50.15(a)(1).

Requests for representation are generally approved when the actions for which representation is requested reasonably appear to have been performed within the scope of the employee's employment and it is determined that it is in the interest of the United States to provide representation. Representation by private counsel at federal expense or reimbursement of private counsel fees is subject to the availability of funds and may be provided when: (1) the actions for which representation is requested reasonably appear to have been performed within the scope of the employee's employment; (2) it is determined that it is in the interest of the United States to

provide representation; and (3) representation by the Department presents a professional ethical issue, *e.g.* the potential existence of inter-defendant conflicts.

From 1999 to the present, the Constitutional Torts Section of the Department of Justice's Civil Division authorized private counsel for 19 AUSAs or United States Attorneys. The section estimates that they authorized direct representation for between 400 and 600 AUSAs during this same time period.

Question 11: When the actions of members of the United States Attorneys' offices are challenged, whether arising from the discharge of their administrative responsibilities or their prosecutorial responsibilities, does the Department represent them or is that the obligation of the individual whose behavior is challenged? Does there need to be any modification to existing law to rectify inequities or inefficiencies in this area?

Answer: The standard used is the same for all other federal employees. Representation would depend on what the person did, whether it was in the scope of their employment, and whether it is in the interest on the government to provide representation.

U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 16, 2003

The Honorable Chris Cannon
Chairman
Subcommittee on Commercial and
Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Enclosed please find responses to questions you posed regarding the appearance before the Subcommittee of Mr. Lawrence A. Friedman, Director, Executive Office for United States Trustees, on April 8, 2003.

Thank you for your attention to this matter. If we may be of additional assistance, we trust that you will not hesitate to call upon us.

Sincerely,

William E. Moschella
Assistant Attorney General

cc: The Honorable Melvin L. Watt
Ranking Minority Member

UNITED STATES TRUSTEE PROGRAM
RESPONSES TO QUESTIONS
FROM HOUSE SUBCOMMITTEE ON COMMERCIAL AND
ADMINISTRATIVE LAW

Questions for the Executive Office for United States Trustees

1) The United States Trustee Program is divided into 21 regions, each of which is headed by a United States Trustee appointed by the Attorney General. The federal court system, on the other hand, is divided into just 12 circuits (not including the Federal Circuit). What are the costs and benefits that would result if the number of regional offices were consolidated into 12 regions?

RESPONSE: The 21 United States Trustee regions are established by statute in 28 U.S.C. § 581. A determination of the costs and benefits of reducing the number of regions would require a thorough analysis of, among other things, the necessary functions performed by the United States Trustees and reallocation of the work load. The United States Trustee Program (USTP or Program) has not recently conducted such a study. The President's budget submission to Congress for Fiscal Year 1997, however, did include a recommendation to consolidate the number of United States Trustee Regions from 21 down to 11 for management reasons. The budget submission did not contain a projection of potential savings on account of the proposal.

2) The principal way in which the Program helps ensure the investigation and prosecution of criminal violations is by making referrals to the United States Attorneys.

A) How many criminal referrals has the Program made for each of the last five years?

RESPONSE: According to Executive Office for United States Trustees (EOUST) compilations of reports from regional and field offices, the Program recorded 4,927 formal criminal referrals in Fiscal Years 1998 through 2002. These referrals generally were made to the United States Attorneys but, in accordance with local law enforcement preferences, the referrals in some districts were made initially to the Federal Bureau of Investigation. The breakdown of referrals by years is as follows: FY 98 – 771; FY 99 – 1,339; FY 00 – 1,174; FY 01 – 898; and FY 02 – 745.

B) What types of referrals were made during this period? Were any criminal referrals made in connection with 18 U.S.C. section 1519?

RESPONSE: The referrals pertained to a wide variety of criminal violations. The majority of the referrals involved alleged violations of 18 U.S.C. § 152, including concealment of assets and false statements. For this time period, our data base does not reflect any referrals were made in connection with 18 U.S.C. § 1519 ("Destruction, alteration, or falsification of records in Federal investigations and bankruptcy"). Section 1519 was not enacted until July 30, 2002.

In addition, bankruptcy fraud referrals frequently contain allegations of other related criminal conduct, including mail fraud, tax fraud, and identity theft.

C) How many of those referrals were prosecuted and what were the outcomes of those prosecutions?

RESPONSE: According to EOUST records, 476 of the referrals in Fiscal Years 1998 through 2002 resulted in convictions. This number is based upon information provided by United States Attorneys to our field offices and may not be complete. In addition, many of the Program's referrals result in indictments under several criminal statutes. If bankruptcy fraud is not the lead charge, it may not show up in the United States Attorneys' data. Moreover, in a number of plea agreements, the bankruptcy fraud count is dropped in order to obtain a guilty plea to other charges such as mail fraud.

As part of broader Program efforts to enhance its data collection and analysis systems, we are redesigning our criminal referral tracking system and will consult with both the Bureau of Justice Statistics and the Executive Office for United States Attorneys to determine if we can design a tracking system that can more reliably follow a case from referral through disposition.

D) What does the Program do if the United States Attorney fails to pursue a referral?

RESPONSE: Criminal referrals often are preceded or accompanied by parallel civil proceedings that may result in civil remedies, including fines, disgorgements, injunctive relief, and other civil penalties. USTP attorneys are authorized to pursue these civil proceedings directly in bankruptcy court, and do so under the US Trustee Program's civil enforcement initiative. If the United States Attorney's office makes the determination not to pursue the referral, the USTP attorneys may still pursue these matters civilly. United States Attorneys have the exclusive authority to criminally prosecute bankruptcy cases. The USTP does not have independent criminal litigation authority. In some instances, United States Attorneys will cross-designate Program attorneys to serve as Special Assistant United States Attorneys (SAUSAs) to prosecute bankruptcy cases. The Program recently hired two experienced Assistant United States Attorneys who will be devoted exclusively to criminal referrals and who serve as SAUSAs. In addition, in one district, the USTP has long funded a full-time Assistant United States Attorney to prosecute bankruptcy crimes.

E) Are there any legislative "fixes" that Congress could consider that would make the prosecution of bankruptcy crimes more efficient and easier to prosecute?

RESPONSE: The Program has no legislative proposals at this time.

3) In July of last year, the President issued an executive order creating the President's Corporate Fraud Task Force.

What role, if any, does the Program play in connection with this Task Force?

RESPONSE: The Program has served as a resource to the Corporate Fraud Task Force by, among other things, providing information about the status of bankruptcy cases involving corporations that are under law enforcement investigation.

4) As you know, the Department of Justice maintains an extensive training facility for all Department employees, including those of the Program, in Columbia, South Carolina. On the other hand, it appears that the Program, rather than utilizing these facilities, has on several occasions conducted training conferences in what might be described as relatively exotic locales, such as Santa Monica, California and Key West, Florida.

RESPONSE: As discussed below in our response to 4B, the Program uses the National Advocacy Center (NAC) extensively, but it is not the exclusive site for all our meetings. The location for these other meetings is selected based on a number of factors including cost and geographic diversity, so that meetings are held in numerous United States Trustee regions. The USTP Managers' Conference was held in Santa Monica, California, in November 2002. This was the first conference at which all USTP field office heads, regional United States Trustees, and senior EOUST staff were brought together in more than 2-1/2 years. The site was selected after a comparison of the total costs (including air fare and hotel) associated with three potential sites. Air fare to Los Angeles tends to be comparatively lower for most employees under Government Travel Rates negotiated by the General Services Administration. The hotel rate in Santa Monica was $109 per night. There was a meeting of United States Trustees and senior EOUST staff in Islamorada, Florida in 1999. Our records show that the cost of each hotel room was $98. In an effort to better document the cost efficiency of meeting site selection, the Program adopted a policy in 2002 by which meeting sites would be selected after a comparison of at least three potential locations.

A) Why does the Program not hold its Managers' Conferences at the Columbia, South Carolina facility?

RESPONSE: The principal reason it is not possible to hold a national Managers' Conference at the NAC in Columbia, South Carolina, is lack of capacity. Approximately 140 persons participate in the Managers' Conference over four days. In addition to rooms for lodging, we utilize a large number of meeting rooms for plenary and break-out sessions. To accommodate the conference, it is likely that the NAC would be unable to hold any other programs for United States Attorney staff or for local prosecutors. (The National District Attorneys Association is another permanent tenant in the NAC.) Additional reasons are provided in the response immediately below.

B) Please explain whether it is more cost-efficient to conduct conferences and training programs at private facilities rather than those available at the South Carolina training facility or at a federal facility located near an airport hub?

RESPONSE: The Program utilizes the NAC extensively. In Fiscal Year 2002, the Program expended $928,000 to train more than 700 staff. Moreover, three Program staff members have offices in the NAC and work full-time in designing and providing courses for our management, legal, financial, paraprofessional, and support staff. We understand that oer 15,0000 federal, state, and local officials are trained annually at the NAC. The courses offered by the Program's National Bankruptcy Training Institute constitute just a small portion of the educational programs presented at the facility by the United States Attorneys' Office of Legal Education and the National District Attorneys Association. In fact, the demand for space often exceeds the capacity of the NAC. Over the past three fiscal years, we have had to displace students to housing outside of the NAC for nearly 50 percent of our classes.

Cost savings from using the NAC are derived largely from lower than commercial rental rates for meeting rooms and audiovisual equipment. The cost of lodging to the Government also is marginally lower at the NAC. These savings often are offset, however, by the higher air fares to Columbia, South Carolina. From Washington, DC, for example, the round-trip air fare is $576. The nationwide average air fare for USTP students going to Columbia is approximately $500. Moreover, travel to Columbia often is cumbersome. Due to flight schedules, a lawyer in Los Angeles basically requires three full days out of the office to attend a one day meeting in Columbia. In contrast, a Los Angeles traveler may save at least one work day of travel time and $200 in lower air fare by traveling to Chicago rather than to Columbia.

The Program considers the above-described factors in determining whether to hold meetings at the NAC. This often causes us to conduct meetings near airport hubs. For example, in the summer of 2001, we conducted extensive briefings for Program managers on the implementation of the bankruptcy reform legislation that then appeared to be imminent. We held three one-day meetings with the audience divided according to geographic region. One of those meetings was held at the NAC and the other two were held at airport hotels in Dallas and Los Angeles.

The Program generally has not held large meetings at other federal facilities located near major airport hubs because of the unavailability of adequate space, additional travel time involved in separating meeting and lodging locations, and the cost savings often realized when renting meeting rooms in the same hotel where staff are lodged.

5) According to materials distributed by the Program at its Santa Monica Managers' Conference last November, total hours expended by Program employees on what is described as "707(b) activity" has more than tripled between the fourth quarter of FY 2000 and the fourth quarter of FY 2002.

A) In light of the Program's limited financial and personnel resources, please explain whether this increase in time expended on section 707(b) matters has been to the detriment of criminal enforcement matters?

RESPONSE: Time spent on section 707(b) and other civil enforcement matters may actually enhance criminal enforcement. For example, a case identified for a civil enforcement action also may be appropriate for a criminal referral. We expect that, over time, the number of criminal referrals will increase as we focus our attention on identifying fraud and abuse in the bankruptcy system.

B) By what amount, if any, did the time expended by the Program's employees on criminal enforcement matters increase during FY 2002?

RESPONSE: According to unofficial time records, Program employees expended 17,156 hours on criminal enforcement matters in Fiscal Year 2002. During the fiscal year, the amount of time rose from 4,157 hours during the first quarter of the year to 4,892 during the fourth quarter. These time records exclude time spent by Executive Office staff, United States Trustees, and support staff. Also, insofar as the same bankruptcy case may be reviewed for numerous purposes, the time category for criminal referrals often includes the time spent packaging a criminal referral, but not the initial case review and investigation which may be captured in other time sheet categories. Furthermore, until recently, the Program has not fully utilized time sheet data for management and other analyses. As senior management increasingly uses the data to measure work and results, and communicates to the field its use of such data, it is expected that the reliability of the time record data will improve.

6) In response to an inquiry, dated August 17, 2001, from my predecessor Congressman Bob Barr, with regard to the Program's efforts to reduce the prevalence of bankruptcy abuse, the Attorney General responded on November 14, 2001 that the Program "has long been at the forefront of attacking abuse in the bankruptcy system and taking vigorous action against the perpetrators both through civil and criminal proceedings." According to the recently released Justice Department's Office of Inspector General (OIG) audit report on the Program's efforts to prevent bankruptcy fraud and abuse, however, OIG found that the Program "has not established uniform internal controls to detect common, higher risk frauds such as a debtor's failure to disclose all assets" and that the Program's "mission to preserve the integrity of the bankruptcy system may not be accomplished as effectively as it should." Indeed, the February 27, 2003 response to the draft OIG report by Executive Office for United States Trustee appears to acknowledge these shortcomings and the need

for "enhanced and comprehensive efforts to identify fraud and abuse in the bankruptcy system."

RESPONSE: In its report, the Office of the Inspector General (OIG) endorsed Program initiatives begun in 2001 to refocus Program priorities and resources on combating bankruptcy fraud and abuse. The OIG favorably commented on the Program's civil enforcement initiative and related management initiatives, such as enhanced data collection. In fact, the OIG concluded that ongoing and proposed civil and criminal enforcement projects will fully address all findings contained in the report.

In summary, the Program's fraud and abuse efforts revolve around twin goals to address debtor misconduct and to provide consumer protection against attorneys and non-attorneys who defraud creditors and debtors alike. We announced a new civil enforcement initiative in 2001, including development of enforcement strategies in all 95 field offices. Field offices are supported by specially designated Civil Enforcement Coordinators, Resource Teams of their peers, and other vehicles designed to assist staff in their enforcement responsibilities. Also, as noted in the OIG report, through February 2002, the Program trained more than 60 percent of its staff in the investigation and prosecution of bankruptcy fraud and abuse.

The enforcement initiative was accompanied by numerous management improvements, including the establishment of a new "Significant Accomplishments" data base through which we now can capture 104 work measures. Within a single year, we automated the data collection system and delivered it to the field so that the required information can be reported by professional employees at their desk top. With anticipated assistance from the Bureau of Justice Statistics and the Executive Office for United States Attorneys, we hope to produce a similar system capturing additional criminal enforcement information. As a result of our initial efforts, in Fiscal Year 2002, the Program took approximately 50,000 civil enforcement and related actions, making available approximately $160 million in potential return to creditors. By any fair measure, the USTP has made significant programmatic and management progress over the past two years to address bankruptcy fraud and abuse.

This most recent effort represents the next – and probably most exciting – chapter in the Program's work to improve the operations of the bankruptcy system. In the early years of its nationwide existence, the Program led the way in moving dormant chapter 11 cases out of the system. It tackled dormant chapter 7 cases which clogged court dockets everywhere and instituted various procedures to ensure that trustees administered cases efficiently and effectively. The Program also established standards for case administration, created fiduciary standards for trustees, and enforced the Bankruptcy Code's anti-conflict provisions. With these important milestones behind it, the Program's recent focus on debtors – including debtor misconduct as well as debtor protections – is simply another logical extension of the Program's long term efforts to enhance the efficiency and the integrity of the bankruptcy system.

A) In light of the OIG report's findings and recommendations, does the November 14, 2001 response still appear to be accurate?

RESPONSE: The November 2001 statement was and remains an accurate statement. Long laboring without recognition, the staff of the USTP have for many years taken countless actions to redress fraud and abuse, and to assist law enforcement in the prosecution of criminal acts. For example, for several years, Program staff have provided training on bankruptcy fraud to FBI and other law enforcement personnel. We also have co-chaired, and continue to co-chair, the multi-agency National Bankruptcy Fraud Working Group and local working groups. We also participate in numerous other inter-Departmental anti-fraud efforts, including the Identity Theft Subcommittee of the Attorney General's Council on White Collar Crime. Building on these achievements, the Program announced in 2001 that enforcement was its first priority. The dedicated professional and support staff of the Program have responded enthusiastically to this initiative. As a result, we believe that we will achieve significant and positive results.

B) In its response to the draft OIG report, the Program, in several instances, appeared to explain that additional funding would better enable it to address certain findings and recommendations set forth in the report. Please elaborate and provide an estimate of the necessary funding. In addition to these matters, are there any other areas that require more funding than currently requested?

RESPONSE: The USTP did not request additional funding in its response to the OIG report. We did, however, make two points in connection with the budget: (1) enforcement agencies are not funded in order to address 100 percent of all violations; and (2) the USTP budgets proposed under President Bush and Attorney General Ashcroft have provided additional resources to combat bankruptcy fraud and abuse.

In Fiscal Year 2002, Congress appropriated $147 million for the Program to enhance civil enforcement and to cope with a rapidly rising case load. This represented an increase of nearly 17 percent over the previous year. In Fiscal Year 2003, Congress appropriated $155.7 million. For Fiscal Year 2004, the Administration has requested an appropriation of $175.2 million. The increased amounts would be used to fund, among other things, additional staff to support enforcement efforts, audits of debtors' financial information, debtor education, and information technology improvements.

C) Does the lack of investigative resources, primarily from the FBI, discussed on page 47 of the OIG report still exist? If so, what suggestions does the Program have to remedy this problem?

RESPONSE: The level of FBI investigations into bankruptcy fraud referrals differs from district to district. The Program has been hiring additional staff through a new criminal enforcement unit to strengthen local bankruptcy fraud working groups, including expanding law enforcement agency participation in the working groups (e.g., IRS-Criminal Investigations,

Postal Inspectors) and assisting those agencies in investigating and prosecuting criminal referrals made by the USTP.

Questions submitted by Mr. Goodlatte of Virginia to be asked of Mr. Lawrence Friedman, Director of the Executive Office for United States Trustees

1) Has the EOUST sought input of the private trustees with respect to the utility of the various reports they must file for each bankruptcy case? On average, what percentage of time spent on a case do you estimate that Trustees spend filling out forms and paperwork?

RESPONSE: Because private trustees are fiduciaries who handle significant sums of money, they are held to high standards of accountability and must report on their administration of cases. In 2002, chapter 7 and chapter 13 trustees disbursed more than $5 billion combined.

Chapter 7 trustees must submit two kinds of reports: (1) interim reports and (2) final reports and accounts. The chapter 7 interim report is more of a case management system than it is a report. Form 1 of the interim report allows trustees to inventory property in an asset case; form 2 is the financial ledger on which trustees record all receipts and disbursements for each case in which funds are received; form 3 provides an inventory of all cases assigned to the trustee; and form 4 is filed with the trustee's final distribution report and shows the various categories in which funds were disbursed. Trustees use their case management systems on an ongoing basis throughout the work day and can produce the interim reports at any given time. Insofar as the final reports and accounts are concerned, trustees are required by law to file these with the court in each case they administer. 11 U.S.C. § 704(9).

The only reports that chapter 13 trustees must file for each bankruptcy case are final reports and accounts and, as in chapter 7, they are required by law to be filed with the court. 11 U.S.C. § 1302(b)(1), which incorporates § 704(9). Chapter 13 trustees also file annual reports and budgets on their overall operations. These do not report on each chapter 13 bankruptcy case, but provide information to enable the Director to fix appropriate percentage fees for chapter 13 trustees' compensation and expenses.

The USTP has a regular dialogue with chapter 7 trustees and chapter 13 trustees through the National Association of Bankruptcy Trustees and the National Association of Chapter 13 Trustees. In each instance, we hold monthly meetings with the liaison committees from these organizations, as well as regular meetings with their various subcommittees, which may be working on any number of projects. Specifically, regarding the utility of various reports, both organizations have had substantial input in creating and revising reports. By way of example, the new Form 4 report filed by chapter 7 trustees was created by a joint committee which started from scratch. The final form was circulated amongst representatives of all interested parties and pilot tested before being implemented. The United States Trustees are also working with a group of chapter 13 trustees, at their request, to reevaluate the trustee budget process and handbook.

The Program does not maintain information on the amount of time private trustees spend on paperwork. The USTP has been vigilant in reviewing and reforming reporting requirements by private trustees both with cost/benefit analysis and performance-based analysis in mind. These efforts have already led the Program to reduce interim reporting requirements on all cases by chapter 7 trustees from 180-day intervals to annual intervals. This reduced the workload of chapter 7 trustees while maintaining the necessary oversight mandated by our mission. In addition, this allowed us to redirect time spent by our staffs' efforts in reviewing these reports every 180 days to our National Civil Enforcement Initiative.

2) In your statement to Congress of March 4, 2003 concerning the need for bankruptcy reform legislation, you state that your offices are more carefully screening Chapter 7 bankruptcy cases. On page 4 of your statement, you stated that as a result of this enhanced scrutiny, you have "ferreted out a high number of cases which, under almost any court standard show abuse by debtors..."

As your office is requiring increased scrutiny of these Chapter 7 cases, would the Executive Office for U.S. Trustees support increasing the $60.00 per case fee that panel trustees are awarded in such cases in order to allow these trustees to devote more time on each case, perform follow-up work, and thus be more vigilant in their scrutiny and administration of the cases? Why or why not?

RESPONSE: In addition to working with chapter 7 trustees, the USTP is requiring more scrutiny of chapter 7 cases by our staffs as part of our National Civil Enforcement Initiative. The Program has not imposed additional duties on chapter 7 trustees. The duties of chapter 7 trustees, however, are extensive and are delineated under Section 704 of the Code. These duties include the following:

1. Collect and reduce to money property of the estate and close such estate as expeditiously as possible.

2. Be accountable for all property received.

3. Ensure that the debtor performs his intention as specified in section 521(2)(B) of this title.

4. Investigate the financial affairs of the debtor.

5. Examine proofs of claims and object to any claim that is improper.

6. If advisable, oppose the discharge of the debtor.

7. Unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest.

8. If the business of the debtor is authorized to be operated, file with the court, the United States Trustee, and any governmental unit charged with responsibility for collection or determination any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the United States Trustee or the court requires.

9. Make a final report and file a final account of the administration of the estate with the court and with the United States Trustee.

To the extent that there are no assets available for administration, the only fee the chapter 7 trustee receives for performing these duties is $60. The Administration has no position on a fee increase at this time.

3) Does the EOUST believe that reducing the duration of time that Chapter 13 bankruptcies are reported on debtors' credit reports would encourage debtors to file Chapter 13 bankruptcies, rather than Chapter 7, and thus encourage more debtors to repay a larger portion of their debt? Would the EOUST support such a measure?

RESPONSE: We cannot predict the effect of this proposal as we have no data upon which to base any prediction. The USTP would support reasonable measures which encourage debtors to voluntarily repay a portion of their debt when they have the ability to do so.